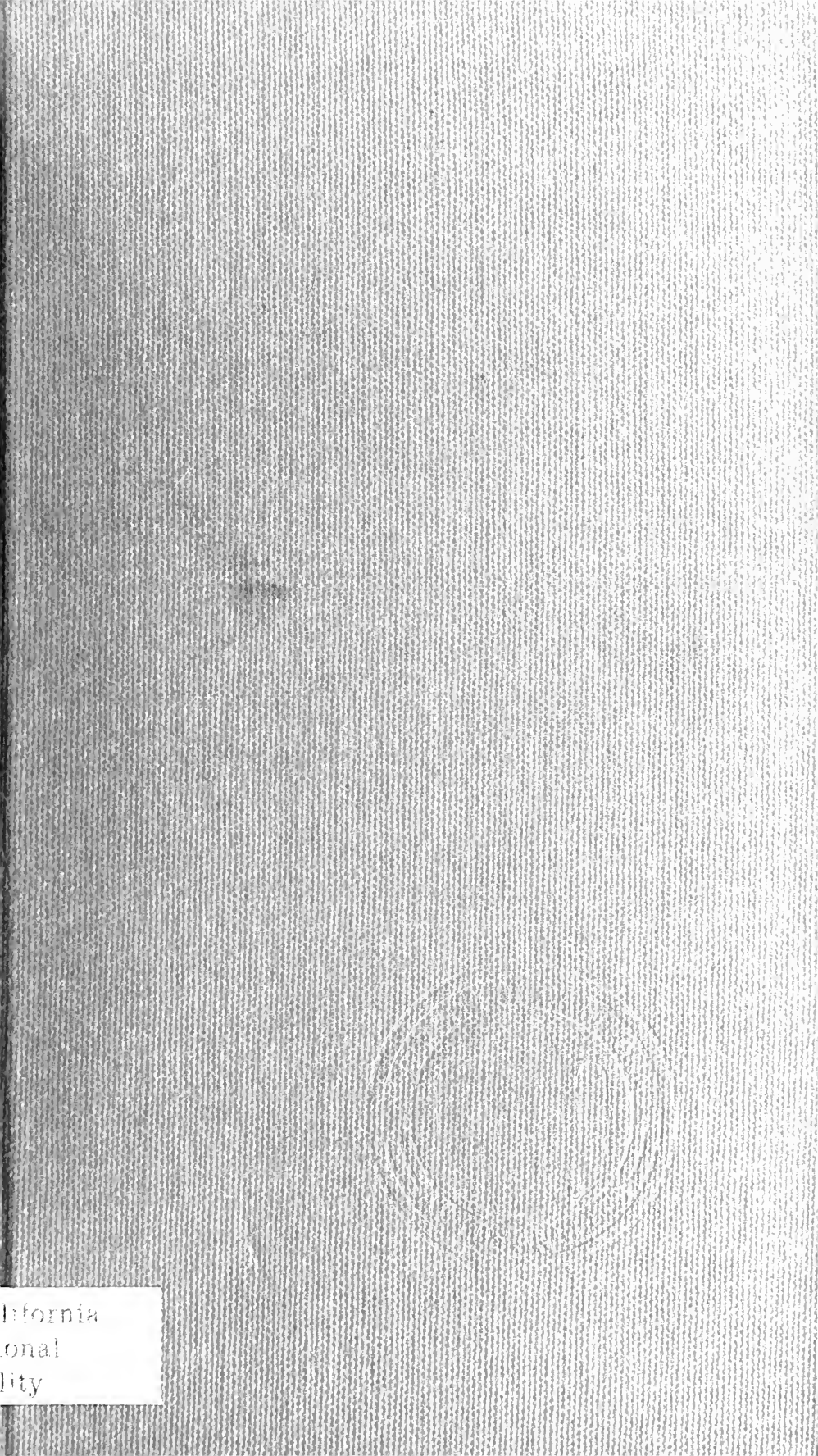

ELEMENTS

OF

INTERNATIONAL LAW.

BY

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SIXTH EDITION,

WITH THE LAST CORRECTIONS OF THE AUTHOR, ADDITIONAL NOTES, AND INTRODUCTORY REMARKS, CONTAINING A NOTICE OF MR. WHEATON'S DIPLOMATIC CAREER, AND OF THE ANTECEDENTS OF HIS LIFE,

BY

WILLIAM BEACH LAWRENCE,

FORMERLY CHARGÉ D'AFFAIRES OF THE UNITED STATES, AT LONDON.

BOSTON:
LITTLE, BROWN AND COMPANY.
1855.

RIVERSIDE, CAMBRIDGE:
PRINTED BY H. O. HOUGHTON AND COMPANY.

CONTENTS.

PART FIRST.

DEFINITION, SOURCES, AND SUBJECTS OF INTERNATIONAL LAW.

CHAPTER I.

DEFINITION AND SOURCES OF INTERNATIONAL LAW.

CHAPTER II.

NATIONS AND SOVEREIGN STATES.

PART SECOND.

ABSOLUTE INTERNATIONAL RIGHTS OF STATES.

CHAPTER I.

RIGHTS OF SELF-PRESERVATION AND INDEPENDENCE.

CHAPTER II.

RIGHTS OF CIVIL AND CRIMINAL LEGISLATION.

CHAPTER III.

RIGHTS OF EQUALITY.

CHAPTER IV.

RIGHTS OF PROPERTY.

PART THIRD.

INTERNATIONAL RIGHTS OF STATES IN THEIR PACIFIC RELATIONS.

CHAPTER I.

RIGHTS OF LEGATION.

CHAPTER II.

RIGHTS OF NEGOTIATION AND TREATIES.

PART FOURTH.

INTERNATIONAL RIGHTS OF STATES IN THEIR HOSTILE RELATIONS.

CHAPTER I.

COMMENCEMENT OF WAR, AND ITS IMMEDIATE EFFECTS.

CHAPTER II.

RIGHTS OF WAR AS BETWEEN ENEMIES.

CHAPTER III.

RIGHTS OF WAR AS TO NEUTRALS.

CHAPTER IV.

TREATY OF PEACE.

APPENDIX.

INTRODUCTORY REMARKS

BY THE EDITOR.

THE position, which Mr. Wheaton occupied in the world of letters, and the space, which he fills in the legal and diplomatic annals of his own country, would give interest to the most ample details connected with his biography. These the Editor hopes to be able to present, at a future day, with a selection from those miscellaneous writings, — the results of the favorable opportunities for the cultivation of the elegant arts, as well as for investigations more particularly appertaining to his peculiar pursuits, which his long residence in different capitals of Europe afforded. His public despatches, and the correspondence which he carried on with many of the most eminent of his contemporaries, both at home and abroad, on subjects which have entered into the permanent history of the world, or which tend to elucidate questions of constitutional or international law, will likewise impart additional value to "The Life of Henry Wheaton."

The pages allotted to an Editorial Notice will not admit of any extended remarks, not immediately applicable to the treatise of which it forms the Introduction. The rank, however, which is accorded to the "Elements of International Law," in the cabinets of Christendom, where it has replaced the elegant treatise of Vattel, whose summary long formed a substitute for the more elaborate works of Grotius and Wolf, and the consideration which it enjoys, not only among diplomatists, but in legislative assemblies and in the tribunals administering the common

jurisprudence of nations, seem to render it proper, in offering to the public the first American edition of his great work, that has appeared since Mr. Wheaton's death, to furnish a brief sketch of his public career and preliminary pursuits. Those who are acquiring from his labors the fundamental principles of that science, of which he was not only a teacher, but which he successfully applied to the service of his country, may well desire a personal acquaintance with the author. It will, it is believed, at least, tend to dispel the illusion, that eminence in diplomacy is attainable by different means from those which are required in other pursuits of life, and show that a minister, worthy of the name, is no more to be created by an executive fiat than a general or an admiral.

Henry Wheaton was born at Providence, in the State of Rhode Island, on the 27th of November, 1785. He was descended from a family identified with that Commonwealth from its earliest colonization. His father, Seth Wheaton, acquired, by commerce and navigation, a fortune sufficient to enable him to afford to his son those advantages of liberal culture and early foreign travel, that so eminently contributed to his success in the subsequent pursuits of life. The elder Mr. Wheaton maintained, during a long business career, a distinguished position among his fellow-citizens; and he held, at the time of his death, the Presidency of the Rhode Island Branch of the Bank of the United States, a station which, from the controlling influence possessed by the parent institution over the currency of the country, till its fatal contest with the government of the Union, in President Jackson's administration, was regarded as the most honorable distinction that could be conferred on a retired merchant.

Mr. Wheaton's mother is represented to have been a woman of strong intellect and of rare delicacy and refinement; and it was by the intercourse with her brother, Dr. Levi Wheaton, not only eminent as a physician, but distinguished for his literary culture, and who, afterwards, became his father-in-law, that our

author's early taste for knowledge was stimulated and encouraged.

Mr. Wheaton, after receiving the ordinary preliminary instruction, graduated at the College of his native State, now Brown University, in 1802. During the ensuing three years he prepared himself, in the office of Nathaniel Searle, then among the prominent practitioners at Providence, for admission to the bar. His studies were, from his earliest days, of a character appropriate to the education of a publicist. Besides his proficiency in the classical and mathematical departments, he was particularly distinguished, at school and college, for his fondness for general literature, and especially for historical research and the investigation of the political annals of nations.

In the spring of 1805, he went to Europe, and though his desire for intellectual improvement and his sound moral principles would, probably, have proved an adequate protection against all improper temptations, it was, perhaps, well for his future success that his father's moderate views of expense did not permit him, at once, to luxuriate in a great metropolis. He established himself at Poitiers, where there was a school of law. His object seems to have been to acquire a familiarity with the use of the French language, in which he had been early instructed; while he availed himself of the opportunity to frequent the tribunals and study the civil law. Indeed, in this branch of jurisprudence, Mr. Wheaton might almost be deemed a pioneer among his countrymen. Even Pothier, whose works contributed so largely to the Napoleon Code, had not then been made accessible to the American lawyer. Nor had Kent and Story, whose decisions derive so much value from their abundant stores of continental lore, and both of whom had repeated occasion to appreciate the early studies of Mr. Wheaton, then assumed their places in the tribunals, which they subsequently illustrated — the one as Chancellor of New York, the other as a member of the Supreme Federal Judiciary.

At the time of Mr. Wheaton's residence in France, the

legislation, substituting a uniform system for the somewhat diversified modifications of the civil law, existing before the Revolution in the several provinces, had only been a year in operation.[1] He was thus induced, at an early day, to study the codes which had not then been rendered into English, and of which he made a translation, the publication of which was only prevented by the accidental destruction of the manuscript. A witness of the transition from the *droit coutumier*, and from a system composed of the Roman civil law and of royal ordinances and local regulations, to a uniform written law, he was preparing himself to exercise an enlightened judgment on codification — a subject which, as a Commissioner of New York, under the first law passed by any State of the Union, for the liberal revision of its statutes, he had, twenty years afterwards, occasion to discuss, with a view to its practical application.

After visiting Paris, where General Armstrong, with whom he was in after life brought into intimate relations, represented the United States, he went to London. He was very kindly received there by our minister, Mr. Monroe, subsequently President of the United States, and he passed six months in that metropolis. As he was in England during the change of Ministry, when Mr. Fox came into power, and during the proceedings against Lord Melville, in which the judicial authority

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[1] By the law of 21st March, 1804, the Roman law, the ordinances, the general and local customs, the statutes and *réglemens*, ceased to have the force of general or particular law upon the matters, which form the subject of the civil code; but the code itself frequently refers to local customs or usages, which are founded on the ancient *coutumes* or laws. France had been divided into two great systems, that of the *pays coutumier* and that of the *pays de droit écrit*. Each of these systems was subdivided into an infinite number of branches. There were more than one hundred and eighty *coutumes générales*, which were modified by a great number of local customs. The *droit écrit*, also, varied in different places. The jurisprudence of the parliaments and the local usages had modified, in different ways, the Roman law, from which the *droit écrit* was drawn. There were, moreover, royal decrees, and ordinances. The different countries, successively incorporated with France, had also their usages and laws. Pailliet, Droit François, Introduction, p. 4, note.

of the House of Lords was exercised, on the presentation of the Commons, as the grand inquest of the nation, he had a favorable opportunity of studying the constitutional system of our mother country, the knowledge of which is so essential to the thorough understanding of our own. He was, also, enabled to compare the practical working of the common law, in the country to which we refer its origin, with the administration of the civil law, whose tribunals he had just quitted.

But it was not merely by the study of the constitutional and municipal jurisprudence of what were then the two greatest nations of Europe, that his foreign residence was beneficial to the future diplomatist. Paris was the centre of all that was attractive, of all that was interesting on the Continent of Europe. The Italian campaigns had already embellished her palaces and her museums with the *chefs d'œuvre* of art, which centuries had accumulated in the capital of the ancient world, and in the most favored cities of the Republics of the Middle Ages. The territorial arrangements, which the Treaty of Utrecht was supposed to have settled on a firm basis, were, despite the successive coalitions to uphold the obsolete fabric of European organization, at an end. Even England had recognized, in 1802, by the short-lived peace of Amiens, concluded with the First Consul, the new order of things, to which every other power had previously given its adhesion. The French Revolution itself had been, it was supposed, brought to a close by the assumption, on 18th of May, 1804, with the almost unanimous approbation of the people, of the sceptre by Napoleon, and by his coronation, under circumstances of peculiar solemnity, on the 2d of December following, as Emperor of the French.

It was while the American student was still at Poitiers, that, by the battle of Austerlitz, the undisputed sway of the Continent, and which was scarcely affected by the untoward movements of Prussia, terminating in the Treaty of Presburg and the affiliation of the French and Russian Emperors, became the property of Napoleon. On the other hand, by the battle of

Trafalgar, contemporaneous with the capitulation of Ulm, the dominion of the sea was secured to England.

A state of war is emphatically the period for the practical application of the law of nations. The relations of his country towards the great European powers, which divided the supremacy of the world, were well calculated to lead an inquisitive mind to the investigations on which Mr. Wheaton's lasting fame reposes. The accession of Mr. Fox, who was understood not to coincide, as to many points affecting neutral rights, with the administration which had preceded him, inspired at Washington new confidence of a settlement of all pending difficulties. This expectation was, also, strengthened by the prospect of a general European pacification, as the members of the new government, when out of office, had been opposed to the policy that had prevailed in reference to the French Revolution. These hopes, however, were destined to an early disappointment.

The Treaty of 1794 with England, objectionable as it was in other respects, had established a joint commission to ascertain the amount of damages sustained by citizens of the United States, for irregular and illegal captures and condemnations, under color of British authority, and for which adequate compensation could not be obtained in the ordinary course of judicial proceedings.[1] Between 1793 and 1800 serious injuries had, also, been inflicted on our commerce, by the capture and condemnation of our vessels and the seizure of our property by France, in violation of the law of nations and existing treaties. All demands for redress were, however, met by counter claims of that power, growing out of the alleged infraction, on our part, of the stipulations of the treaties of alliance and of commerce, of 1778, and of the consular convention of 1788. After hostile measures, extending even to what our author terms an imperfect war,[2] had been resorted to by the United States,

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[1] United States Statutes at Large, vol. viii. p. 121.

[2] Part IV. c. 1, § 7, p. 365, note 1. See also for acts passed on this subject,

the respective pretensions of the two parties, not specially reserved, were abrogated by the operation of the treaty of peace, of September 30, 1800, or were renounced, at least as between the countries, by the circumstances connected with its ratification. Reclamations, which had been reserved by that treaty, or such as were, at the time, deemed to be valid by the plenipotentiaries of the two powers, were provided for by one of the conventions, concluded on the 30th of April, 1803, for the purchase of Louisiana.[1]

The Berlin and Milan decrees, the commencement of that system which had for its object the exclusion of English produce and manufactures from the whole European Continent, had not, with the Orders in Council professed to be based on them, then been issued. But, the practice of paper blockades was begun, and an apology for those decrees and other obnoxious imperial ordinances, which laid the foundation for claims that occupied our diplomacy for more than a quarter of a century, and until their liquidation under President Jackson, had, according to that belligerent code which considered the spoliation of one enemy a just ground for an equivalent violation of neutral property by the other, already been afforded. The practice of impressing seamen from our merchantmen, when visited by British men-of-war, under the belligerent plea of the right of search for contraband, or, according to the rule that then prevailed, for enemy's property, which had been a ground of complaint from the earliest days of the French Revolution, and which, at all events, had no pretension of retaliation, founded on the enemy's proceedings, to support it, had been resumed on the termination of the peace, established by the Treaty of Amiens. Not only had the rule of the war of '56 — never asserted in the intervening one of the American Revolution, and for captures under which compensation had been made,

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United States Statutes at Large, vol. i. pp. 561, 565, 572, 578, 624, 743. Vol. ii. pp. 7, 39.

[1] See Part IV. c. 4, § 3, p. 611, note.

in pursuance of the Treaty of 1794, been revived; but, instead of its being confined to a prohibition of the direct trade between the enemy's colonies and the mother country, colonial produce, though reëxported from the United States, in accordance with the rule, as announced by Lord Hawkesbury to the American Minister, Mr. Rufus King, in 1801, was captured and condemned in the Courts of Admiralty.[1]

What was well calculated to increase the offensive character of the British proceedings was, that, while they excluded all neutral vessels from the trade assumed to be open to them in war but not in peace, that is to say, from the enemy's colonial and coasting trade, a communication with the enemy's colonies was encouraged, by licenses and other means. Thus, by the Act of 45 Geo. III. c. 57,[2] (27th of June, 1805,) free ports were established in the English West India islands, and an intercourse formed between them and the enemy's colonies and settlements. The articles therein mentioned, being the growth, produce, or manufacture of any of the colonies or plantations in America, belonging to any European State, were allowed to be imported, from any of those colonies or plantations, into the enumerated ports, in any foreign vessel whatever, not having more than one deck, and owned and navigated by persons inhabiting those colonies or plantations. Tobacco was especially permitted to be exported from those countries to the enumerated ports, and from thence to the United Kingdom. The exportation from those ports to any of the colonies or plantations in America, belonging to or under the dominion of any foreign European sovereign, in any vessel in which importations were authorized, of "rum, the produce of any British island, and also" (in order, it would seem, to encourage the British navigation engaged in the slave-trade,) "of negroes, which shall have been brought into the said island in British-

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[1] American State Papers, vol. vi. p. 268.

[2] British Statutes at Large,

built ships, owned, navigated, and registered according to law," was particularly favored. All other articles, except those specially prohibited, might likewise have been thus exported. Goods, also, from any port of Europe, were allowed to be, in the same way, brought into the British islands, and from thence to be exported in a British vessel to any British colony in America or the West Indies, and an Order in Council, of the 5th of August, 1805, prohibited, under the penalty of confiscation of the vessel and cargo, all intercourse of neutrals with the enemy's colonies, except through the free ports.

The same course was subsequently pursued, in reference to the trade with the Continent of Europe, after the blockade of the French coast. By the Act of 48 Geo. III. c. 37,[1] (14th April, 1808,) the king was empowered by an Order in Council to permit, during hostilities, goods to be imported into any port of Great Britain or Ireland, from any port or place from which the British flag was excluded, in any ship or vessel belonging to any country, whether in amity with England or not. And it is stated that, while all regular neutral commerce was interdicted, 8,000 English licenses were granted in 1811, and that in 1808 and 1809 the system had been carried to a still greater extent. Thus English vessels had been authorized by their own government to violate a blockade, which this same government had been obliged, according to their own declaration, to establish for the purpose of legitimate defence, and which it so vigorously maintained against neutrals.[2]

It was the seizure, in 1805–6, of a large number of vessels, whose cargoes had been landed and the duties on them paid, which it had been previously declared would be deemed to break the continuity of the voyage, that, in connection with the subject of impressment, induced President Jefferson, in April, 1806, to

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[1] British Statutes at Large,

[2] See Martens, Recueil, Supp. tom. v. p. 449, for the Orders in Council regulating the trade. Manning's Law of Nations, p. 340. Hautefeuille, Droits des Nations Neutres, tom. i. p. 158.

unite Mr. Pinkney with Mr. Monroe in that mission, which led to the conclusion, *sub spe rati*, of the treaty with Lord Holland and Lord Auckland, that failed to meet the approbation of the Executive. The absence of any provision with regard to impressment would have been sufficient to have prevented its submission to the Senate. The official note, which the American Plenipotentiaries had received from the British Commissioners, pledging their government to caution in the exercise of the practice, so far from being deemed a substitute for an express stipulation, might have been regarded as a recognition of the pretension; while a proposed reservation, at the moment of signing the treaty, and which was intended to justify the retaliatory measures that might be founded on the French decree of November 21st, 1806, and control our proceedings towards a third party, for the vindication of our neutral rights, would alone have rendered a ratification, on our part, inadmissible. By the British it was expressly declared, that their ratification would not be given, unless the French either withdrew the Berlin decree or the United States gave their government assurances that they would not submit to it.[1]

On Mr. Wheaton's return to America, he entered on the practice of his profession in his native town, but the character of the business, usually intrusted to a young lawyer in a provincial capital, is not such as was calculated to call into exercise the particular attainments of our author. There was, however, in the condition of the world ample scope for the talents of a young American, conversant by practical observation with the events that characterized the first part of the nineteenth century. The seven years from 1806 to 1813, which comprise the period that elapsed between Mr. Wheaton's return home and his final removal from his native State, were precisely those during which the neutral powers were exposed to the alternate aggressions of the two great belligerents; "the

[1] American State Papers, vol. vi. p. 368.

conduct of both of whom," in the language of Mr. Madison, when Secretary of State, "displayed their mutual efforts to draw the United States into a war with their adversary;" and among maritime States, America, after the gross violation of the law of nations by England towards Denmark, in 1807, stood alone.

Mr. Wheaton, whose nearest relatives were of the school of Jefferson, and whose republican sentiments were unavoidably strengthened by his European residence, was, during these years of comparative leisure, an efficient supporter, by his contributions to the periodical press, of the administrations of Jefferson and Madison. The Rhode Island Phœnix, afterwards the Rhode Island Patriot, copies of which are still preserved in the Historical Society of the State, contain many papers from his pen. Among his fellow laborers of that period were the present venerable Judge Pitman, of the United States District Court, and the late Governor Fenner, both of whom belonged to the Republican party, as the friends of the administration were then termed, while its opponents, according to the political nomenclature of the day, were called Federalists. Jonathan Russell was also associated with him in the task of instructing the public mind of New England, as to the wrongs which their country was receiving at the hands of the European belligerents; and with him, while the diplomatic representative of the United States, successively in Paris and London, in 1810, 1811, 1812, as well as during his residence abroad, as a Commissioner at Ghent, and our first Minister to Sweden, he carried on a continued correspondence, which would elucidate many details connected with that eventful period of our diplomacy.

The letters addressed to Mr. Wheaton, at this time, from distinguished citizens in different sections of the Union, show, that his reputation was already being established beyond the limited bounds of his native State, and it would seem that his appointment as Secretary of Legation, either to Paris or London, was then contemplated. Among his correspondence of 1811 there is a letter from one of the Heads of Department,

enclosing a communication, which he fully endorses, from the editors of the National Intelligencer, not only the ablest journal at the seat of government, but then, as it was understood, the exponent of the views of the Administration, thanking him in strong terms for a political article, which he had furnished, and inviting further contributions.

While yet resident at Providence, he delivered, on the 4th of July, 1810, an oration before his townsmen, in acknowledging the receipt of which Mr. Jefferson says: "he rejoices over every publication wherein such sentiments are expressed. While these prevail all is safe."

In 1811, Mr. Wheaton married his cousin Catharine, the daughter of Dr. Wheaton, to whom he had been attached from an early day, and who, after partaking with him all his vicissitudes of fortune, at home and abroad, still survives her irreparable loss. He appears, at this period, to have sought a wider field than his native place afforded for his talents, and to have intended to exercise his profession in the State of New York. This, however, was prevented by the old system of apprenticeship or clerkship, only fully abrogated by the Constitution of 1846. It, at the time referred to, required a novitiate of at least three years, which, Judge Spencer wrote to his father in law, could not then be dispensed with, even in the case of a practitioner from another State, or in consequence of attainments however extensive.

Towards the close of 1812, and some months after the declaration of the war with England, Mr. Wheaton was induced to take charge of a paper in New York, established under the title of the National Advocate, as the organ of the Republican party, in that city. The editorship of a daily newspaper at that time presented no flattering position. With the exception of the National Intelligencer, and of a few other cases, the newspapers of the United States, forty years ago, instead of being the vehicles of sound political intelligence and the means of diffusing correct information among the people, on the great

topics of public interest, were the mere conduits of personal invective and party acerbity.

The establishment of the National Advocate constitutes a new epoch in the history of the newspaper press of the country. At the conclusion of the first year, the Editor remarks: "Our ideas of the manner in which a free press should be conducted were developed in the Prospectus, and we contracted the obligation that this print should be conducted in conformity to them. We promised that it should never wound the feelings of virtue; never infringe the laws of decorum; and never spare the vices of political turpitude. It is for our readers to determine how far we have performed our engagements." [1]

In the Advocate were discussed, with the pen of a gentleman and scholar, the great questions of violated neutral rights, which had given rise to the belligerent position of the country. The new duties which war had created, on the part of our country, towards other nations, and the rights which it gave us, as well as the obligations of the several State governments to the Federal government, and the paramount allegiance of the citizens of the different States to the United States, were elucidated with the learning of an accomplished publicist.

The period was one well calculated to arouse the patriotism of a republican editor. War had been declared, when there had been a refusal to make an adjustment on the subject of impressment, and after it had been officially announced to the American government, that the obnoxious Orders in Council would not be repealed, without a repeal of internal measures of France, which, not violating any neutral rights, we had no pretence to call on her to abrogate, and with regard to which England, therefore, had no excuse for asking us to interpose, even if one belligerent could make it a ground of offence towards a friendly power, that it had neglected to exact from the other all that

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[1] National Advocate, December 15, 1813.

its neutral rights would authorize. Great Britain, after first requiring us to obtain the repeal of the Berlin and Milan decrees to induce an abandonment of the Orders in Council, was not satisfied with their abrogation, as regarded the United States, but demanded that their repeal should be general, and should extend to the removal of the prohibition of English produce and manufactures from the continent of Europe, where they operated as internal and municipal regulations not contravening any rights of neutrality.

The diplomatic papers of the American government, indeed, show that there was ground enough for a resort to extreme measures against both the great European belligerents, especially after the case of The Horizon,[1] in 1807. The effect of such an anomalous condition of things would scarcely have changed the actual position of the parties, inasmuch as the navy of Great Britain, by driving from the ocean not only the military, but mercantile, marine of France, had left her unassailable by us, in a maritime war, — the only species of hostilities that we could carry on against a strictly European power. Moreover, the avowed withdrawal of her hostile decrees, by France, in 1810,[2] though the indemnity for past spoliations was deferred, had, already, induced a distinction in her favor as to our retaliatory interdicts on commercial intercourse. And the conviction, which circumstances subsequently confirmed, that the savages had been, while peace with the mother country still continued, excited by her provincial authorities, to carry the horrors of barbarous warfare into our frontier settlements, and that a secret agency had been instituted to separate the New England States from the Union, was deemed to justify a difference of conduct towards the two nations. War was consequently declared, on the 18th of June, 1812, against England alone.

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[1] American State Papers, vol. vi. p. 463.
[2] Ibid. vol. vii. p. 441.

At this day, looking not only to the causes of the war — the utter disregard of our flag in the impressment of our seamen, aggravated, even so early as June, 1807, by the act of a British admiral, scarcely disavowed and most inadequately atoned for, in wresting, after the loss of several lives, four of the crew from a ship of war of the United States,[1] and the condemnation of our vessels, in pursuance of Orders in Council, which even the British courts of admiralty did not venture to assert were consistent with the law of nations, but to the manner in which it was conducted — subjecting to conflagration edifices consecrated to legislation, setting at naught the ties of a common origin and introducing the tomahawk of the Indian among the weapons of British warfare, it is scarcely possible to believe that those, to whom the Constitution confided the conduct of our foreign affairs, did not receive the unanimous support of the American people and of the State authorities.

Such, however, was not the fact. It is true that some of the most illustrious, in the annals of federalism, merged all party considerations in their patriotic obligations,— that the coadjutor of Jefferson in the declaration of Independence and his great rival, at the origin of the government, the Ex-President Adams, exclaimed, "How it is possible that a rational, social, or moral creature can say that the war is unjust, is to me utterly incomprehensible. I have thought it both just and necessary for five or six years." Such, also, were the often reiterated opinions of Oliver Wolcott, Secretary of the Treasury under the administrations of Washington and Adams. Samuel Dexter, another member of the last cabinet of the federal party, whose political reputation was merged in his forensic fame, and Rufus King, deservedly esteemed one of the most enlightened statesmen among the founders of the government, and who was looked to as the individual, on whom alone President Madison's opponents

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[1] See case of The Chesapeake. American State Papers, vol. v. p. 480.

could consistently rally for the chief magistracy, though not approving the war in advance, achieved for themselves an eternal claim to the gratitude of their country, by sustaining the administration, when menaced by foreign armies and internal foes.

Not only were the energies of the government shackled by local legislatures denying, in the very midst of hostilities, the sufficiency of the causes of the war, and justifying the acts of Great Britain as being retaliatory of those of France, while even the victories achieved by our own infant navy were availed of to repudiate their glorious exploits, as unbecoming the approbation of a moral and religious people; but the federal authorities were, in 1813, brought into direct collision with those of Massachusetts and Connecticut. The Governors of those States assumed the right of determining for themselves the exigencies, which authorized the calling out of the militia, even in time of war, and refused to allow them to be placed in any case under the orders of the officer of the United States, commanding the regular troops within the military department. The unconstitutionality of these pretensions, which it was obvious would have defeated the main object for which the federal government was formed, and which, as pronounced by the Supreme Court of the United States, it was one of his last acts, when connected with that tribunal, to report,[1] was, at the time, ably exposed by Mr. Wheaton in the columns of his journal. It was, also, his duty to point out the highly objectionable nature of the convention of delegates from some of the New England States, held at Hartford, in 1814, for the purpose of considering their sectional interests; but which the news of peace, arriving almost simultaneously with their adjournment, rendered wholly innocuous.

Among the articles of the Advocate, which appropriately

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[1] Wheaton's Reports, vol. xii. p. 29. Martin v. Mott. See also Ibid. vol. v. p. 1. Houston v. Moore. Kent's Com. vol. i. p. 265.

belong to the department of international law, was a vindication on the authority of Vattel and Bynkershoek, of the right of expatriation, in answer to Gouverneur Morris, an eminent statesman and diplomatist of the Anti-Republican party. Nor was this subject then a mere theoretical question. Great excitement had prevailed, in consequence of the menaces of the enemy to execute the naturalized citizens of British origin, who might be taken prisoners of war, the barbarity of which was not a little increased by the fact that military service was exacted from natives of the United States domiciled in Canada. The retaliatory measures of the American government, in selecting as hostages British prisoners to double the number of the individuals whose lives were in jeopardy, seems to have prevented a perseverance in the threat. Questions of maritime law were frequently discussed, and in the columns of his friend's paper first appeared Judge Story's opinion, deciding the illegality of enemy's licenses — a subject which, from the extent to which they were then used in order to supply with provisions the British armies in the Spanish Peninsula, attracted great attention.

Enjoying, as Mr. Wheaton did, the confidence of the members of the Cabinet, the Advocate was frequently selected as a medium through which to acquaint the people with the views of the administration. Such was the case, as regards the statement of the reasons, which, at an eventful period of the war, induced the removal of General Dearborn from the command of the army, and of the causes of the failure of the subsequent campaigns of Generals Wilkinson and Hampton, with which he was furnished by the Secretary of War, General Armstrong. He received, after the conclusion of peace, through the Attorney-General, Mr. Pinkney, an expression of the obligations of all his colleagues for the able support which he had rendered to the government, with a special commendation of the papers published by him on the treaty, and which that eminent jurist declared to be "as well as could be wished."

Of an oration pronounced on 4th of July, 1814, and while the war still continued, a notice remains in a letter of the gentleman who succeeded Mr. Pinkney as Attorney-General. He says: "I have read it with equal attention and pleasure. It is filled with correct, enlarged, patriotic, forcible thoughts, purely expressed, and oftentimes with energy and eloquence. I am glad to see the republican mind getting roused to the assertion of our great principles in times like these, when the aristocracy of the other hemisphere is so boldly attacking them. I am particularly delighted with the manner in which you have handled the European question."

It was not merely to American affairs that the discussions of the Advocate were confined. His knowledge of Europe, with his intercourse with those most familiar with passing events, including the French Minister, Mr. Serurier, of whom he was a correspondent, enabled its editor to present the different aspects of the great pending contest, which was destined to change the whole fabric of European organization. His sagacity anticipated the permanent predominance, which Alexander was already achieving for Russia in the affairs of Europe; while the Emperor's accordance with us in maritime questions is shown to have been the reason, why, though united with him in an alliance, for continental matters, on which the destinies of both seemed to depend, Great Britain refused his proffered mediation, in the war with the United States.

While engaged in his editorial avocations, Mr. Wheaton received the commission of Division Judge-Advocate of the army. The unanimous confirmation of the appointment, on the 26th of October, 1814, was announced to him not only by letters from two distinguished Senators, but the venerable Vice-President Gerry made it the subject of a congratulatory communication, in which he says: — "Your appointment was not only unanimous, but the voice of the Senate was expressed with cordiality." This was the more flattering, as General Armstrong had already quitted the War Office, and the National Advocate had

continued, in opposition to popular prejudice, excited against him on account of the disastrous affair of Washington, to support and sustain him, as "entitled to the gratitude of the nation, for having put out of the way the superannuated generals, and for bringing forward a set of generals, (Brown and Scott,) who rescued our country from eternal disgrace."

In May, 1815, Mr. Wheaton left the National Advocate, on being appointed one of the Justices of the Marine Court,—a tribunal of limited jurisdiction, and which is now shorn of much of its former consideration; though in presiding over it, some of those, who were afterwards distinguished as the most eminent at the bar, passed a portion of their professional novitiate. Whilst occupying a seat in this court, which he continued to fill till July, 1819, he had occasion to vindicate the paramount treaty-making power of the Federal Government. The case arose in 1816, under the commercial convention with Great Britain of the preceding year, and the question was, whether the reciprocity provision extended to the exemption of British vessels from the discriminating charges imposed by a local law of the State on foreign vessels.

In 1815, under the modest title of a "Digest of the Law of Maritime Captures or Prizes," Mr. Wheaton published his first systematic treatise. This was a subject to which he appears to have directed his attention from the period when, by the declaration of war by the United States against England, the admiralty jurisdiction became a matter of serious attention to the members of the legal profession, resident in the seaports. But, though its preparation was induced by the want of a work, for the daily reference of the practising lawyer, its utility was far from being limited to the circumstances out of which it arose. The "Digest" is not a mere index, but presents an exposition of the law of nations, as then understood and administered; and though the language of the original authorities, to insure accuracy, is properly employed in preference to his own, no position is stated, the full effect of which is not appreciated by the writer.

Intended as a practical treatise, Mr. Wheaton gives a full analysis of the adjudications of the tribunals of different countries, and especially of England and the United States, on questions of prize, and which necessarily involved a review of all those debateable points of maritime law, which had been the subjects of our diplomatic discussions. The opinions on which the reputation of Sir William Scott (Lord Stowell) is based, had already been promulgated, with his views of the influence which the instructions of his government ought to have even over tribunals professedly acting as the exponents of the law of nations. And if any important additions have since been made to the authorities, on which reposes the law, deduced from the decisions of Admiralty Courts, as it was understood prior to the commencement of the present war, it is mainly in the reports of that tribunal, with which Mr. Wheaton's name is indissolubly connected, that they are to be found.

In reference to this work, Judge Story wrote to the author, on 13th of December, 1815: — "You have honorably discharged that duty, which every man owes to his profession, and I am persuaded that your labors will ultimately obtain the rewards which learning and talents cannot fail to secure." At the same time, the Attorney-General of the United States, Mr. Rush, who was subsequently Minister, at different periods, to England and France, informed him that he had made his book the basis of a work on the state of American jurisprudence.

Thirty years after its publication, an English writer, a high authority on international law, declared the work on captures to be, "in point of learning and methodical arrangement, very superior to any treatise on this department of the law, which had previously appeared in the English language."[1] Nor has it been superseded by the other books of Mr. Wheaton. It embraces a department of public law not discussed, or at most only incidentally touched on, in the more general treatises with

[1] Reddie's Researches, Historical and Critical, in Maritime International Law.

which he has enriched the science of international jurisprudence. Though intended as an exposition of the existing state of prize law, as administered in our tribunals, nowhere else can so clear and accurate a view of the English and French edicts against neutral commerce be found; and in no other publication are they so ably brought to the test of the universal law of nations.

Mr. Wheaton also prepared, in 1815, a bankrupt law, and endeavored to procure its passage through Congress. This measure was, at that time, deemed the more important, as the constitutionality of the State Insolvent Laws began to be questioned, and it was believed that the power delegated to the General Government could alone meet the provisions on this subject, supposed to be required in a commercial community.

He also published, after the peace of Ghent, "An Essay on the Means of Maintaining the Commercial and Naval Interests of the United States." He advocated, as called for by the restrictive policy then existing in Europe, a navigation act, giving special advantages to our vessels, and excluding all foreign sailors from our merchant marine. The former measure has been rendered inapplicable, in a great degree, in consequence of the arrangements since made with most maritime States by our reciprocity treaties, or by means of the acts of Congress, proffering to all nations a mutual abrogation of the discriminating duties on the tonnage of their respective vessels, and on the produce, manufactures, and merchandise imported in them.[1]

The exclusion of alien seamen was repeatedly proposed by by the Executive, not, however, on politico-economical considerations, but in connection with an arrangement with the British government on the impressment question, but without result. Though we cannot distinguish between native citizens

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[1] See act March 3, 1815, United States Statutes at Large, vol. iii. p. 224; act January 7, 1824, Ibid. vol. iv. p. 2; May 24, 1828, Ibid. p. 308; May 31, 1830, Ibid. p. 425; July 13, 1832, Ibid. p. 579.

and those who are already entitled by naturalization to the same rights, save in the exceptional cases expressed in the Constitution; yet it was supposed that the Act of 1813, requiring a continuous residence during the probationary term, which is wholly incompatible with the nature of the sea-faring life, might have been received by England, as a practical exclusion from the commercial service of all foreign-born seamen. That provision was repealed in 1848;[1] and the Act of March 27, 1804, denationalizing any American vessel, the owner of which, in whole or in part, if a naturalized citizen, shall reside more than a year in the country from which he originated, or more than two years in any foreign country, which still remains in force,[2] would seem to be the only discrimination now known to our laws between native and naturalized citizens.

In 1816, Mr. Wheaton became Reporter of the Supreme Court of the United States, in which capacity he continued till 1827. Twelve volumes of Reports, containing, as it is well termed in a German notice of our author, "the golden book of American law," permanently connect his name with the jurisprudence of the Union. Already familiar with the languages and literature of Europe, and with her legal systems, he was called on to record the application of every branch of public and municipal law to the diversified objects of international and federal relations, as well as of private rights. It was his fortune to be associated with that high tribunal during the period when the Prize Code, which he had already traced, as far as it was then established, was completed by the subsequent adjudications of the cases growing out of the recent war. In his time, also, the power intrusted to the Court, and which is peculiar to institutions like ours, of bringing to the test of the Constitution the validity of all the proceedings of Congress and of the State legislatures, was exercised to such an extent, as to leave little room for the further interpretation of our organic law.

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[1] See Part II. ch. 2, § 10, p. 164, note *a*.

[2] United States Statutes at Large, vol. ii. p. 296.

In a review by Mr. Wheaton of one of the volumes of the Reports of Judge Story's Circuit decisions, and which includes many prize cases, he thus gives a history of prize law to the time of the late war: "Among the leading principles of law, developed and settled during the war of the Revolution, and which have ever since been recognized as a part of the prize code of this country, are the following: — The exclusive jurisdiction of the Court of Admiralty over all the incidents of prize and its right to entertain a supplemental libel for distribution of the prize proceeds after condemnation.[1] That an ally is bound by the capitulation made by another ally with the inhabitants of a conquered country, by which their property is exempted from capture.[2] But that an ally is not bound by a mere voluntary suspension of the rights of war against a part of the enemy's dominions, by a co-belligerent, not growing out of a capitulation.[3] The distinction between a perfect war and an imperfect war, or partial hostilities.[4] That in a perfect war nothing but a treaty of peace can restore the neutral character of any of the belligerent parties; and consequently that the British proclamation of 1781, exempting from capture all Dutch ships carrying the produce of Dominica according to the capitulation by which that island had surrendered to the French, did not restore back to a Dutch ship her original neutral character, so as to protect her cargo from capture by American cruisers under the ordinance of Congress of April 1, 1781, by which the United States temporarily adopted the principles of the armed neutrality, which had been formed in Europe the preceding year.[5] That the rule recognized by this ordinance of *free ships free goods*, did not extend to the case of a fraudulent attempt by neutrals, to combine with British subjects to

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[1] Dallas' Rep. vol. ii. p. 37.
[2] Ibid. p. 15.
[3] Ibid. p. 17.
[4] Ibid. p. 21.
[5] Ibid. pp. 18–21.

wrest from the United States and France the advantages they had obtained over Great Britain by the rights of war in the capitulation of Dominica, by which all commercial intercourse between that island and Great Britain was prohibited. "That Congress did not mean by their ordinance to ascertain in what cases the rights of neutrality should be forfeited in exclusion of all other cases; for the instances not mentioned were as flagrant as the cases particularized.[1] That the papers which a vessel is directed to sail with, by the municipal law of her own country, are the documents which a prize court has a right to look for as evidence of proprietary interest; though not conclusive evidence.[2] The fraudulent blending of enemy's and neutral property in the same claim involves both in the same condemnation.[3] The domicile of a party is conclusive as to his national character in a prize court.[4] The municipal laws of any particular country cannot change the law of nations: as between captor and captured, the property is divested instantly on the capture; but a neutral claimant is not barred until a final condemnation in a competent prize court. All other municipal regulations of salvage extend only to the citizens of the country making those regulations.[5] The authority of the prize court to make distribution of the prize proceeds where there is no agreement between the owners, officers, and crew of the capturing vessel.[6] And its authority to decree a sale where the *res* in litigation is perishable.[7] The conclusiveness of sentences of condemnation upon the property.[8] The simplicity of the prize proceedings upon the papers found on board, and the examination of the captured persons.[9] That the omission of the captors to bring in all the

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[1] Dallas' Rep. vol. ii. p. 23.
[2] Ibid. p. 11.
[3] Ibid. p. 33.
[4] Ibid. p. 42.
[5] Ibid. p. 37.
[6] Ibid. p. 37.
[7] Ibid. p. 41.
[8] Ibid. p. 41.
[9] Ibid. p. 40.

captured persons and papers will not forfeit their rights of prize, unless a fraudulent omission.[1] And lastly, the illegality of trade by a citizen with the enemy." [2]

Mr. Wheaton very happily contrasts our system of admiralty courts, as at present organized, with those of other countries. "The subjects of foreign States have had reason to rejoice that the decision of their rights have been vested in the same pure hands, with which the people of this country have intrusted their dearest privileges. Nor does the experience of other countries give us or them any reason to regret that our prize jurisdiction is not placed in a cabinet council, or judges removable at the pleasure of such a council. Even that highly gifted and accomplished man, (Sir W. Scott,) has been compelled to avow that he was bound by the king's instructions; and we know that his decrees are liable to be reversed by the privy council, from which those instructions emanate.[3] So, also, in France, both under the royal and imperial governments, the prize jurisdiction has been almost constantly vested in the Council of Prizes,—a board composed of members removable at the pleasure of the crown—a mere commission created at the breaking out of every war, and dissolved on its termination. During the anarchy of the Revolution, it was exercised by judges, many of whom were notoriously concerned in privateers, the fruits of whose plunder from innocent neutrals they were to adjudge.[4] The rapacity

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[1] Dallas' Rep. vol. ii. p. 33.

[2] Cranch's Rep. vol. viii. p. 102.

[3] The Orders in Council, in reference to neutral trade, gave rise to discussions in the British courts of admiralty as to the obligatory force of the King's instructions. Sir W. Scott appeared, at one time, to regard the text of these instructions as binding on his judicial conscience, (Robinson's Adm. Rep. vol. ii. p. 202,) and at another he held it indecorous to anticipate the possibility of their conflicting with the law of nations, (Edwards's Adm. Rep. p. 604); while Sir James Mackintosh declared that if he saw in such instructions any attempt to extend the law of nations injuriously to neutrals, he should disobey them, and regulate his conduct by the known and generally received law of nations. (Hall's Law Journal, vol. i. p. 217.)

[4] A decree of July 18, 1854, established a Council of Prizes to decide on the

and injustice of the French and British courts of vice-admiralty in the colonies, are notorious." [1]

Even while the United States, after the achievement of their independence, were at peace with all the world, controversies between the assured and the underwriters presented questions requiring the application of the principles of the law of nations, and in that way the law of blockade, of commercial domicile, and other points affecting the international code, as well as the innovations which the belligerents were attempting to introduce into maritime law, were judicially considered. The court, also, in the decision of the cases, growing out of the war of 1812, reported before Mr. Wheaton's connection with them, had declared that, as the United States at one time formed a component part of the British Empire, their prize law was, as understood at the time of the separation, the prize law of the United States, though no recent rules of the British courts were entitled to more respect than those of other countries; yet that, where there were no reasons to the contrary, they should regard the decisions of the English courts of admiralty.[2]

In the case of The Nereide,[3] they had not only affirmed the rule, that the goods of an enemy in the vessel of a friend were prize of war, and that those of a friend in the vessel of an enemy were to be restored, to be a part of the law of nations, but they also decided that the stipulation in the treaty of 1795, with Spain, that "free ships shall make free goods," does not imply the converse proposition that "enemy ships shall make enemy goods." In the same case, they differed from Sir William

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validity of all prizes made under French authority, during the present war with Russia. It is composed of a President, who is a Counsellor of State, and six members, who are named by an imperial decree on the nomination of the ministers of foreign affairs and of the marine. Annuaire des Deux Mondes, 1853-4, App. p. 911.

[1] North American Review, vol. viii. p. 256.

[2] Cranch's Rep. vol. ix. p. 191. Thirty hogsheads of sugar *v.* Boyle.

[3] Ibid. p. 388.

Scott, and recognized the right of a neutral to carry his goods in an armed vessel of the enemy. And in the case of The Adeline,[1] it was decided, that the law of France denying restitution upon salvage after twenty-four hours possession by the enemy, the property of persons domiciled in France should be condemned as prize by our courts, on recaption, after being in possession of the enemy that length of time.

The volumes of Wheaton contain decisions, declaring the property of a citizen engaged in trade with the enemy liable to capture and confiscation as prize of war, under whatever circumstances it might be carried, whether between an enemy's ports and the United States or between such port and any foreign country;[2] that the sailing under an enemy's license was sufficient of itself to subject to confiscation without regard to the object of the voyage or port of destination;[3] that a citizen of the United States, who had acquired a domicile abroad, but had returned to the United States and become a redintegrated American citizen could not, *flagrante bello*, acquire a neutral domicile, by again emigrating to his adopted country;[4] that the stipulation in a treaty, "free ships make free goods," although they should belong to enemies, contraband excepted, does not exempt the goods belonging to citizens of the captor's country engaged in trade with an enemy;[5] that the property of a house of trade in an enemy's country is confiscable, notwithstanding the neutral domicile of one or more of the partners;[6] that there can be no restitution, on payment of salvage to the original owner, where a vessel captured and condemned, was recaptured

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[1] Cranch's Rep. vol. ix. p. 244.

[2] Wheaton's Rep. vol. i. p. 74. The Rugen.

[3] Ibid. p. 440. The Hiram. Ibid. vol. ii. p. 143. The Ariadne. Ibid. vol. iv. p. 100. The Caledonia.

[4] Ibid. vol. ii. p. 77. The Dos Hermanos.

[5] Ibid. p. 247. The Pizarro.

[6] Ibid. vol. i. p. 169. The Antonia Johanna.

by an American privateer, the original title being extinguished by the condemnation.[1]

The Supreme Court also decided that it is the exclusive right of governments to acknowledge new States arising in the revolutions of the world, and until such recognition by our government, or that to which the new State belonged, courts of justice are bound to consider the ancient order of things as remaining unchanged;[2] that in case of the Spanish American governments, the government of the United States having recognized the existence of a civil war between Spain and her colonies, the courts of the United States were bound to consider as lawful those acts, which were authorized by the law of nations, and which the new governments may direct against their enemies, and their captures were to be regarded as other captures *jure belli*, the legality of which cannot be determined in the courts of a neutral country.[3]

The court likewise decided, in reference to the acts declaring the slave-trade piracy, passed by the United States and Great Britain, that the right of visitation and search did not exist in time of peace, and that a vessel engaged in the slave-trade, though it was prohibited by the country to which it belonged, could not

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[1] Wheaton's Rep. vol. iii. p. 79. The Star.

[2] Ibid. p. 324. Gelston *v.* Hoyt. In the case of the Rhode Island controversy in 1842, the same rule was adopted in relation to conflicting claims to the government of a State of the Union. The Chief Justice (Taney) said: "No one, we believe, has ever doubted the proposition that, according to the institutions of this country, the sovereignty in every State resides in the people of the State, and that they may alter and change their form of government at their own pleasure, But, whether they have changed it or not by abolishing an old government, and establishing a new one in its place, is a question to be settled by the political power. And when that power has decided, the courts are bound to take notice of its decision, and to follow it." Howard's Rep. vol. vii. p. 47. Luther *v.* Borden.

[3] Ibid. vol. iv. p. 53. The Divina Pastora. Ibid. vol. vii. p. 377. The Santissima Trinidad.

be seized on the high seas and brought in for adjudication in the courts of another country.[1]

But, it is by the important adjudications, defining the limits of the federal and state jurisdictions, that the judicial administration of Marshall, who presided during the whole period, was distinguished. That the repeal or alteration, by a State, of the charter of a private corporation, which a college was declared to be, was a violation of the constitutional prohibition to pass any law impairing the obligations of contracts[2] — that it was competent for Congress to establish a national bank, which could not be taxed by any individual State[3] — and that no State could grant

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[1] Wheaton's Rep. vol. x. p. 67. The Antelope. In declaring the slave-trade piracy, it was the expectation of the United States that it would be ultimately so regarded under the law of nations. The act of 15th May, 1820, (United States Statutes at Large, vol. iii. p. 600,) declared guilty of piracy every citizen of the United States, on board of a foreign vessel, and every person, whether on board of a vessel owned in whole or in part by, or navigated on behalf of, a citizen of the United States, engaged in the slave-trade; and by a resolution of the House of Representatives, in 1823, the President was requested to enter into negotiations with the maritime powers of Europe and America for the ultimate denunciation of the slave-trade as piracy, under the law of nations, by the consent of the civilized world. President Monroe, in a message, in relation to the convention signed at London, on 13th March, 1824, (the ratification of which, though the treaty was assented to by England as originally proposed by us, failed in the Senate,) said that conventions for a mutual right of search had been resisted by the Executive, on two grounds: one, that the constitution of mixed tribunals was incompatible with our constitution; and the other, that the concession of the right of search in time of peace, for an offence not piratical, would be repugnant to the feelings of the nation. But, by making the crime piracy, the right of search attaches to the crime, and which, when adopted by all nations, will be common to all. In the meantime, the obvious course seemed to be, to carry into effect with every power such treaty as may be made by each in succession. In negotiating the treaty in question with the British government, it was made an indispensable condition, that the trade should be made piratical by act of Parliament, as it had been by act of Congress; but, instead, of subjecting the persons detected in the slave-trade to trial by the courts of the captors, as would be the case, if such trade was piracy by the law of nations, it was stipulated that, until that event, they should be tried by the courts of their own country only. Cong. Doc. 18 Cong. 2d Sess.

[2] Ibid. vol. iv. p. 518. Dartmouth College *v.* Woodward.

[3] Ibid. p. 316. M'Culloch *v.* The State of Maryland. Ibid. vol. ix. p. 738. Osborn *v.* The Bank of the United States.

a right for the exclusive use of its navigable waters,[1] nor pass a bankrupt or insolvent law, affecting preëxisting contracts, or contracts between citizens of different States,[2] are among the decisions to be found in Wheaton's Reports ; while,—what connects these adjudications immediately with the treatise to which these remarks are introductory,—the faith of international obligations was upheld, not only by establishing the appellate jurisdiction of the Supreme Court, in a case where the validity of a State law was called in question, as repugnant to a treaty of the United States, but by asserting, what is the distinguishing feature between our existing institutions and those of the old confederacy, the power to carry into full effect the judgment, without the aid of the State Court.[3]

The character, which Mr. Wheaton at once acquired as a reporter, was unrivalled. He did not confine himself to a summary of the able arguments by which the cases were elucidated, but there is scarcely a proposition on any of the diversified subjects to which the jurisdiction of the court extends, that might give rise to serious doubts in the profession, that is not explained, not merely by a citation of the authorities adduced by counsel, but copious notes present the views which the publicists and civilians have taken of the question. Not only are Pothier and the civil code constantly quoted, and their conclusions compared with those of the common law ; but, on the introduction of a case from Louisiana, we have an explanation of the jurisprudence, which prevailed in that colony at the time of its annexation, showing how far the French and Spanish laws respectively, were in force.[4]

The value of some of the more extended notes, as well as the general character of the reports, we can have no better means

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[1] Wheaton's Rep. vol. ix. p. 1, Gibbons *v.* Ogden.

[2] Ibid. vol. iv. p. 122, Sturges *v.* Crowninshield. Ibid. vol. xii. p. 213. Ogden *v.* Saunders.

[3] Ibid. vol. i. p. 305. Martin *v.* Hunter.

[4] Ibid. vol. iii. p. 202. Shephard *v.* Hampton.

of estimating than by the contemporaneous remarks, in reference to the first volume, of the learned Judge of the Court, to whose correspondence with the author we have already adverted. Judge Story says: "I received yesterday your obliging favor, accompanied with a copy of your reports. I have read the whole volume through hastily, but *con amore*. I am extremely pleased with the execution of the work. The arguments are reported with brevity, force, and accuracy; and the notes have all your clear, discriminating, and pointed learning. They are truly a most valuable addition to the text, and at once illustrate and improve it. I particularly admire those notes, which bring into view the civil and continental law, a path as yet but little explored by our lawyers, but full of excellent sense and judicial acuteness. In my judgment there is no more fair or honorable road to permanent fame than by the breathing over our municipal code the spirit of other ages. In my judgment your reports are the very best in manner of any that have ever been published in our country, and I should be surprised, if the whole profession do not pay you this voluntary homage. Respecting the note on the rule of 1756, I have already written my opinion; it is the best comment that the rule has ever received. The kind notice of our friend, Dexter, in the preface, is delightful to us all; and on turning to the argument in Martin *v.* Hunter, I perceive the splendid paragraph preserved in its original brightness."[1] The work, also, received the approbation of all the other members of the court, and among other commendations, from judicial authorities, of the manner in which Mr. Wheaton's task was performed we may refer to that of the great English admiralty judge, Sir William Scott.

Judge Story's letter renders unnecessary the insertion of the equally strong testimony of the merits of the reports by William Pinkney, whose note lies before us. Daniel Webster, to whom

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[1] Judge Story to Mr. Wheaton, Salem, January 8, 1817.

the North American Review was indebted for an article on one of the early volumes, says: "We wish to express our high opinion of the general manner in which the Reporter has executed his duty in the volume before us. Mr. Wheaton has not only recorded the decisions with accuracy, but has greatly added to the value of the volume by the extent and excellence of his notes. In this particular his merits are, in a great degree, peculiar. No reporter in modern times, as far as we know, has inserted so much and so valuable matter of his own. Those notes are not dry references to cases, of no merit, but as they save trouble of research. They are an enlightened adaptation to the case reported of the principles and rules of other systems of jurisprudence, or a connected view of decisions on the principal points, after exhibiting the subject with great perspicuity and in a manner to be highly useful to the reader. Mr. Wheaton's annotations evince a liberal and extensive acquaintance with his profession. His quotations from the treatises of the continental lawyers are numerous and well selected. This is a branch of learning not much cultivated among us. Mr. Wheaton appears to have pursued it to some extent and to good purpose. It enables him to give a peculiar interest to his volume, nor is there a better mode in which he could communicate his own acquisitions of this sort to the profession than by judicious and appropriate notes to reported cases."[1] In a notice of the subsequent volumes, the writer, in suggesting a work on the admiralty jurisdiction exercised by our courts, before and since the adoption of the Federal Constitution, remarks, "A work embracing this and its cognate topics is a desideratum; and we know no man who could accomplish it with greater facility or talent than Mr. Wheaton. We will hazard a suggestion that when he shall publish another edition of his valuable treatise on prize law, he will greatly enhance the obligation of the profession, by adding an historical sketch of the kind we have above

[1] North American Review, vol. viii. p. 70.

mentioned. Let us not be supposed, however, to have overlooked his excellent notes on the prize jurisdiction and practice appended to the two first volumes of his reports. There is no systematic treatise on the jurisdiction of the admiralty in England, or here, that is accurate and thorough. True and lasting fame awaits the jurist who shall produce one."[1]

Mr. Duponceau, the jurist, as well as philologist, and whose annotations of Bynkershoek, in common with the original treatise, are cited in the "Elements," among the authorities on which international law is based, names the notes of Mr. Wheaton, giving comparative views of the laws of different countries on the various subjects treated of in the body of the work, among the most valuable contributions made to the science of law; while he alludes to the treatise on captures, in connection with Judge Story's and Chancellor Kent's works, as being "the fruits of the cultivation of the branches of jurisprudence not accessible to ordinary lawyers."[2]

And we may here venture the hope that in the improved condition of judicial science, it may not be by the piratical abridgment, to which we shall have occasion to refer, that the decisions of the Supreme Court during its most glorious days are to be known to posterity. The adjudications of that tribunal, explanatory as they are of the fundamental principles of our Constitution, would lose much of their value, if they are hereafter to go forth, unaccompanied by the commentaries of the eminent advocates and statesmen — of Pinkney and his contemporaries and successors in forensic fame, Dexter, Harper, Wirt, Emmett, Hunter, Edward Livingston, Ingersoll, Clay, and Webster, who constituted a bar worthy of Marshall, Washington, Livingston, Story, and Thompson.

It was not only as the medium of communication with the public that Mr. Wheaton was connected with the Supreme

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[1] North American Review, vol. xvii. p. 126.

[2] Duponceau on Jurisdiction, Preface, p. 20.

Court. Associated with the jurists of historical fame, to whom we have just alluded, in the argument of causes, the decisions of which he reported, we find his contributions to the common stock of legal learning, combined with theirs in every volume to which his name is attached. The law of real property, the principles regulating commercial contracts, as well as those relating to that department of jurisprudence, prize law, with which he had shown a peculiar acquaintance, were discussed by him in the character of counsel.

Nor did he omit to take an efficient part in those questions on which the interpretation of our organic law is based. In the great case which settled the limits of the state and federal legislation, in reference to bankruptcy and insolvency, and which, first argued in 1824, was held under advisement and not finally disposed of till after a second argument, in 1827, he was throughout the sole associate of Daniel Webster; while there were, at different times, arrayed against them Mr. Clay, Mr. Ogden, Mr. Haines, Mr. Wirt, (Attorney-General,) Mr. Edward Livingston, Mr. Jones, and Mr. Sampson, most of whom are known in the political as well as the legal annals of our country. Indeed, such was the position which Mr. Wheaton's industry and learning had acquired for him, that, on the death of Judge Livingston, in 1823, he was, already, prominently brought forward to fill the vacancy on the bench of the Supreme Court, an appointment which, it is understood, that he would have received, had it not been conferred, by President Monroe, on a member of his cabinet.[1]

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[1] "Brockholst Livingston, an associate Judge of the Supreme Court of the United States, died this year, (1823.) He possessed an intellect of the highest order, and was an able lawyer. Several distinguished lawyers from this State were announced as candidates for the office, which had become vacant by Judge Livingston's death, among whom were Chief Justice Spencer and Mr. Henry Wheaton. The President finally appointed Smith Thompson, late Chief Justice of this State, then Secretary of the Navy." Hammond's Polit. Hist. of New York, vol. ii. p. 136.

In 1821, Mr. Wheaton was elected a delegate from the city of New York to the convention for forming a new constitution for the State. The original constitution, adopted in 1777, was objected to on account of the restrictions on the right of suffrage, a freehold qualification being required from the electors of the Governor and Senate, and the payment of a tax, with the renting of a tenement of, at least, the specified annual value, from every one who voted for members of the lower house. Exception was, also, taken to the provision, which blended the judicial, executive and legislative powers in the Council of Revision, composed of the Governor, Chancellor, and Justices of the Supreme Court, to whom a veto on the acts of the two houses was accorded, as well as to the irresponsible nature of the appointing power vested, with a concurrent right of nomination in all the members, in a council, consisting of the Governor and one Senator, chosen by the lower house, from each of the four senatorial districts of the State.

In the law providing for the election of delegates, the principle was recognized that whatever restrictions might exist for ordinary legislation, the whole people had a right to participate in the formation of their organic law, and the convention was chosen according to a rule intended to approximate, as near as practicable, to universal suffrage. The members were selected from among the most eminent citizens, and in some degree, without reference to party designation or local residence. Among them were the two Senators in Congress, Rufus King and Martin Van Buren, since President of the United States, who represented a county where he did not live, as well as the actual Vice-President, Daniel D. Tompkins. The Chancellor, Kent, and Chief Justice, Spencer, were delegates from Albany; while Mr. Wheaton had as an immediate colleague Nathan Sanford, the successor of Chancellor Kent, in his judicial office, and, both before and subsequent to this period, a Senator of the United States.

In this assembly Mr. Wheaton bore a conspicuous part.

Among the propositions which he introduced was one rendering it the duty of the legislature to pass general laws on the subject of private corporations, and prohibiting their establishment by special acts. The importance of such a measure was then particularly apparent, inasmuch as private banking was interdicted and the business regarded as a legislative franchise. The obtaining of bank charters had given rise to an extended system of corruption, from the suspicion of which, even the judges, through their connection with the legislation of the State, as members of the Council of Revision, were not wholly exempt. Though the article was not adopted, its wisdom was recognized, when the constitution was again remodelled in 1846, and it now forms a portion of the fundamental law of the State. He also proposed a constitutional provision, making it the duty of the legislature to cause the cities and towns to raise the sums necessary, in addition to the amounts received from the common school fund, to maintain public schools in every town for the instruction of all the children.

On the subject of the Judiciary, for the independence of which he was a strenuous advocate, opposing the provision to make the Judges removable by the joint resolution of the two houses of the legislature, he contributed valuable suggestions.

In the canvass for the Presidential term, to commence on the 4th of March, 1825, though following the second election of Mr. Monroe, which had been made with entire unanimity, there seemed to be no concurrence of opinion. Mr. Crawford, the Secretary of the Treasury, who had been designated by the caucus, as the meeting of the republican members of Congress for that purpose was denominated, according to the system which had prevailed at several previous elections, was opposed by all the other aspirants for the station, however much they might differ among themselves. These candidates were John Quincy Adams, Secretary of State, Mr. Calhoun, Secretary of War, Mr. Clay, Speaker of the House of Representatives, and Andrew Jackson, whose administration of the government

during two subsequent terms forms so memorable a portion of our history. Though the last named was then known to the nation at large only by his military fame, as having with far inferior forces, composed mainly of militia, triumphantly repelled the veteran legions of England, in their attempted invasion of Louisiana, his course, during the canvass, was already such as to disarm the opposition of many, who had entertained apprehensions from the elevation of a successful general to the highest civil office. "Jackson," said one of the most eminent of his associates in the Senate, and to whom we have before had occasion to refer, as rising above the dictates of party in the war of 1812, "conducts himself in a most unexceptionable manner, and so as to remove prejudices, which may be entertained to his disadvantage."[1]

As the distinctive appellation of "People's Party," assumed by those to whom Mr. Wheaton attached himself, implied, he was opposed to the candidate of the caucus; and while Mr. Calhoun remained before the public for the chief magistracy he was his confidential correspondent. To advance the pretensions of the Carolina statesman to the highest office was Mr. Wheaton's motive, in permitting himself to be elected a member of the New York State Assembly, in November, 1823; and it is not a little remarkable, when we look to the views which Mr. Calhoun subsequently took of our system of government, that our author's original preference for him was induced by a concurrence of sentiment on the subject of the Federal Judiciary. To preserve to the Supreme Court the exposition of the Constitution, in the last resort, was then deemed by Mr. Calhoun, as his letters of that period show, an object of primary importance. And it may well incline us to regard with indulgence the changes which inferior minds undergo, when we find one afterwards so eminent in the liberal school of political economy, and whose integrity of purpose and purity of life are unassailable, writing

[1] Mr. Rufus King to Mr. Wheaton, January, 31 1824

to his friends in the legislature of New York, to suggest "the propriety of adopting some resolutions not to support any one not known to be openly in favor of domestic manufactures and internal improvements." "The adoption of such," he added, "would go far to prostrate the hopes of the radicals, at once, in your State."[1]

The immediate object, aimed at by Mr. Wheaton and those who voted with him, was the election of Presidential electors by the people, instead of their being chosen, as had been previously the usage in New York, by the two houses of the legislature. In this effort, notwithstanding the Governor was induced to call an extra meeting to consider the matter, after its failure at the regular session, they were not successful. But, in the final result, only four electors favorable to Mr. Crawford, though he was sustained by the friends of Mr., afterwards President, Van Buren, were chosen, while the remainder were divided between Mr. Adams and Mr. Clay, in the proportion of eighteen for the former and fourteen for the latter. As the loss of the greatest part of the New York votes, though Mr. Crawford was still returned as the third on the list, and therefore eligible to be chosen by the House of Representatives, was deemed fatal to the caucus party, our author received from the most eminent of their opponents, from, among others, John Quincy Adams, Mr. Calhoun, (who was chosen Vice-President by the joint vote of General Jackson's and Mr. Adams's friends,) and Rufus King, the strongest congratulations on the happy result of his labors, in, what the warmth of partisan feeling characterized as, a "struggle for the cause of the people." Mr. Adams's letter thus concludes: "Your share in the legislative labors of the year have been great and conspicuous. I trust it has been introductory for you to movements on a yet wider field; and observe with pleasure your name among those of the candidates for a seat in the United States Senate."[2] Mr. Calhoun writes:—

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[1] Mr. Calhoun to Mr. Wheaton, December 23, 1823.

[2] Mr. Adams to Mr. Wheaton, November, 1824.

"Never, in this country, has there been a more important political contest. The whole train of future events depended on the result. The part which you have individually taken has been important and honorable to you, and will, I trust, be held in remembrance to your advantage. You have acted under circumstances of great complication, and of relations apparently contradictory, and if you have erred at all on any point, such error may be traced to a firm and virtuous tone of character." [1]

Divisions in the party, which had achieved the victory in the legislature, were occasioned before the termination of the political year by the removal of De Witt Clinton, to whom the successful issue of the New York system of internal improvements was ascribed, from the place of Canal Commissioner, and which led to his subsequent election as Governor, an office that he had previously filled. In the resolution, respecting Mr. Clinton, Mr. Wheaton voted with the majority. Whatever his merits as a citizen of the State, his course, though avowedly a Republican, in permitting himself to be the candidate of the Federalists for the Presidency during the war, and in opposition to Mr. Madison, could not readily be forgotten by one who had taken an active and zealous part in support of the administration of 1812. These circumstances not only prevented the fulfilment of the suggestions to which Mr. Adams refers, and defeated Mr. Wheaton's election to the House of Representatives, for which he was nominated in the city of New York, but caused those public proofs of confidence from the administration which, on the election of Mr. Adams, he had a right to anticipate, to be deferred.

As, however, in matters purely of a professional character, no partizan qualities can serve as a substitute for learning, Mr. Wheaton was, in 1825, associated with Mr. Benjamin F. Butler, afterwards Attorney-General of the United States, and Mr. John Duer, now an eminent member of the New York Judi-

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[1] Mr. Calhoun to Mr. Wheaton, November 20, 1824.

ciary, in a commission for revising the statute law of New York. Though the plan in view was a recompilation of the statutes, and not a codification of the common law, it was contemplated in the appointment of the commissioners that they should not confine themselves to merely bringing together the laws referring to the same subject, but that they should collate and revise all public acts in force, in such a manner as they should deem most useful and proper to render the acts more plain and easy to be understood, with the single restriction that no change should be made in the phraseology or distribution of the sections of any statute, that had been the subject of judicial decision, by which its construction could be affected.[1]

These labors were of a character particularly agreeable to the taste of Mr. Wheaton. Not merely for the improvement of the existing statutes, but for the preparation of a code of a more comprehensive character, had one been contemplated, he possessed peculiar qualifications, through his varied knowledge of jurisprudence, which included, as has been shown, a familiarity, almost from their origin, with the French codes become, with slight alterations, the law of most of the States of continental Europe.

Applying himself to his new duties, while continuing his professional business and his functions as Reporter of the Supreme Court of the United States, he united with his colleagues in a report to the legislature, at the session of 1826, in which they state the arrangements, which they had made for the classification of the statutes, and submit, as a specimen, a portion of the revision, embracing the constitutional and administrative law of the State, together with their views as to the general execution of the work. He also zealously engaged in carrying the plan, which the legislature sanctioned, into execution, and a portion of the revision, as completed, was presented for adoption at the session of 1827; but other duties called him away from the

[1] Revised Statutes of New York, Ed. 1836, vol. 3, p. 409.

country, before the whole work, as perfected by his associates and Mr. John C. Spencer, eminent as a jurist, and well known as having filled some of the highest stations in his State and in the Union, who had been appointed to succeed him, was enacted as a law.

In his letter of resignation he says: "I cannot refrain from expressing the grateful sense I feel at the proof of confidence which has been reposed in me by the legislature of this State, in associating my name with a work of such magnitude and interest. There is, in my view, no public employment of more permanent dignity and importance; and though considerations, not necessary to be adverted to, have induced me, after mature deliberation, to relinquish it, I feel very great regret in quitting a work, in which I have labored with a zeal disproportioned to my faculties, and which I deem closely connected with the reputation and prosperity of the State of New York." [1]

Mr. Wheaton, at all times, combined the general cultivation of letters with the pursuits more especially connected with his chosen profession; and his right to be enrolled among the *littérateurs* of the country was recognized by his alma mater, as early as 1819, by conferring on him the degree of Doctor of Laws, in which she was followed, some years afterwards, by Hamilton College and Harvard University at Cambridge. Of the literary societies, that existed in New York during his residence there, he was, of course, an honored member. As such the Anniversary Address, before the Historical Society in 1820, was pronounced by him. He selected, as his subject, "The Science of Public or International Law;" and as this essay contains the germ of his great works on the law of nations, it will not be deviating from the proper scope of an introductory notice to refer to the reception which it met with, at the time of its publication, from those of his countrymen most competent to appreciate it.

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[1] Mr. Wheaton to Governor Clinton, June, 1827.

The venerable John Adams said: "I have read this discourse with uncommon interest and peculiar delight. It is the production of great reading, profound reflection, a discriminating mind, and a pure taste. I have never read any discourse produced in America relative to the science of public law with so much satisfaction. Had I read such a discourse sixty-five years ago, it would have given a different and more respectable cast to my whole life." [1]

Mr. Jefferson writes: "I thank you for the very able discourse you have been so kind as to send me on international law. I concur much in its doctrines, and very particularly in its estimate of the Lacedæmonian character. How such a tribe of savages ever acquired the admiration of the world has always been beyond my comprehension. I can view them but on a level with our American Indians, and I see in Logan, Tecumseh and the Little Turtle fair parallels for their Brasidas, Agesilaus, &c. The difficulty is to conceive that such a horde of barbarians could so long remain unimproved, in the neighborhood of a people so polished as the Athenians; to whom they owe altogether that their name is now known to the world. All the good that can be said of them is, that they were as brave as bull-dogs." [2]

Chief Justice Marshall, in a letter in reference to the reports, says: "I did not thank you while in Washington for your anniversary discourse, delivered before the Historical Society of New York, nor for your digest of the decisions of the Supreme Court, because I had not leisure, while at that place, to look into either. Since my return to this place, I have read the first with a great deal of pleasure, and have glanced over the digest with much satisfaction.

"However preëminent the ancients may have been in some of the fine arts, they were, I think you very clearly show, much

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[1] John Adams to Mr. Wheaton, February 7, 1821.

[2] Mr. Jefferson to Mr. Wheaton, February 15, 1821.

inferior to us, or a great way behind us, in the more solid and more interesting principles of international law; a law which contributes more to the happiness of the human race than all the statues which ever came from the hands of the sculptor, or all the paintings that were ever placed on canvas. I do not, by this, mean to lessen the value of the arts. I subscribe to their importance, and admit that they improve as well as embellish human life and manners; but they yield in magnitude to those moral rules which regulate the connection of man with man.

"Old Hugo Grotius is indebted to you for your defence of him and his quotations. You have raised in him in my estimation to the rank he deserves." [1]

Chancellor Kent, who, on occasion of the decision of a case in which Mr. Wheaton was counsel, and which rested on the French law of marriage,[2] had acknowledged in the strongest terms his obligations for the elucidation of the nuptial community of goods which his argument afforded, and which he, alone of the bar, was capable of furnishing, thus addressed him, on the receipt of this pamphlet: — "Be pleased to accept my thanks for your very interesting and able discourse on the History of International Law, delivered before the Historical Society. There is no person (unless it be our mutual friend and great master of jurisprudence, Judge Story) who could have handled the subject with so much erudition and enlightened judgment. It is a subject very much to my taste, and awakens the deepest interest. Be assured, my dear Sir, that I feel with full force the great obligations we are all under to you, for your professional efforts and illustrious attainments."

It will be recollected, in this connection, that the Law of Nations forms a branch of those "Commentaries on American Law," which now occupy with every student of the science

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[1] Chief Justice Marshall to Mr. Wheaton, March 24, 1821.

[2] De Couche v. Savetier, Johns. Ch. Rep. vol. iii. p. 211, cited in Part II. ch. 2, § 6, p. 138.

the place formerly allotted to Blackstone; while the name of Kent is associated with that of Wheaton, both at home and abroad, as an authority on International Law.

Another occasional discourse, by Mr. Wheaton, was an address delivered at the opening of the New York Athenæum, in 1825, which is thus alluded to by Mr. Madison, in a letter expressing his disappointment that the author's occupations would not permit his undertaking a work that had been proposed to him:—"I shall not be singular in regretting that it could not be executed by the pen, which furnished such a specimen of judicious and interesting observations, as distinguished the elegant address at the opening of the New York Athenæum." In that discourse, Mr. Wheaton took a rapid survey of what had been accomplished in American literature; and pointing out the connection between the principles on which the ancient republics were founded and the rapid growth of the arts and sciences to which they gave encouragement — tracing analogies and causes in a manner which indicated deep reflection on the nature, spirit, and tendencies of our government — he presented an interesting view of the intellectual prospects of the country.

To the periodical literature, and which received no inconsiderable elevation in the respect and consideration of the community, from the extensive attainments and personal reputation of the conductors of the Reviews established at Boston and Philadelphia, he was a large contributor. Accomplished scholars, such as Edward Everett, Jared Sparks, and Robert Walsh, were able to command the assistance, as *collaborateurs*, of many of the most eminent men of the Union; and the Quarterlies of the United States, at one period, would have favorably compared with the first periodicals of Europe.

Mr. Wheaton's numerous essays in other journals cannot be accurately traced, but in almost every volume of the North American, commencing with the first number, in May, 1815, may be found papers emanating from his pen, or his name is introduced in connection with notices of his works. His car-

liest article was a patriotic defence of the United States against the illiberal attacks of the British press; whose virulence, increased by the war, had been holding us up to the derision of Europe, because in our infancy our literature had not attained the ripeness of adolescence, and that while all our efforts were required for the creation of the necessaries, we were wanting in some of the refinements, which belong to nations where a favored class have the leisure to devote themselves to the elegancies of life.[1]

Among the reviews furnished by him, while yet at New York, is the exposition of the early Prize Code of the United States, already noticed,[2] and he availed himself of the publication of Mr. Cushing's translation of Pothier on Maritime Contracts, the work by which the present Attorney-General of the United States marked his legal novitiate, to aid in making his countrymen acquainted with the merits of that most learned lawyer, by whose introduction to the English bar Sir William Jones deemed that he had, in some measure, paid the debt that every man owes to his profession.[3] But he was not, as a jurist, exclusively absorbed in the civil and international law. His learning in the old Common Law appeared not only in his own Reports, but in the notice which he gave of Mr. Metcalf's edition of Yelverton,[4] and by the numerous authorities cited in his edition of Selwyn's Nisi Prius;[5] while in making his readers acquainted with what he terms, in a letter to his friend, Mr. Butler, "Verplanck's beautiful speculation on the theory of the Law of Contracts, as to price," and in which he contends for absolute equality in contracts, as binding *foro conscientiæ*, he had an opportunity of considering how far the doctrines of law and equity, as expounded by the courts, accorded with the rules of natural justice.[6]

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[1] North Am. Rev. vol. i. p. 61. [2] Ibid. vol. viii. p. 254. Supra, p. 22.
[3] Ibid. vol. xvi. p. 196. [4] Ibid. vol. xvi. p. 169.
[5] Reviewed, North Am. Rev. vol. xix. p. 158. [6] Ibid. vol. xxii. p. 253.

The review of a trial for manslaughter, which, arising from the killing of a counsellor-at-law, in an affray growing out of the occurrences at a trial, excited intense interest at the time, contains a learned disquisition on the distinctions between the criminal law of the Continent and that of England, especially in reference to the regard which the former pays, in certain offences, to the intent rather than to the event, as constituting the criminality.[1]

On the other hand, not only had Mr. Wheaton Daniel Webster as the reviewer to whom the "Reports" were assigned,[2] but Edward Everett was himself the author of the learned notice which the Historical Address received.[3]

The last labor in which Mr. Wheaton engaged, while still in the United States, out of the regular performance of his professional duties, and disconnected with the offices which he held as Reporter and Revisor, was the preparation of the Life of William Pinkney; if, indeed, writing the biography of the most eminent member of the profession to which he belonged, and who was also among the most distinguished in the one on which he was about to enter, could be deemed a deviation from his appropriate pursuits.[4]

If this enterprise had had no other effect than to elicit from President Madison two letters, explanatory of the events connected with the adoption of our restrictive system, and of the immediate circumstances that caused the declaration of war, at the time that it occurred, it would have been the means of adding valuable materials to history. In his letter, of the 18th of July, 1824, Mr. Madison says that the President was unofficially possessed of the Order in Council of November 11, 1807, when the message to Congress, of December 11, 1807, recommending an embargo, was sent; and this fact is corroborated by a note to him from Mr. Jefferson, confirming his recollections.

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[1] North Am. Rev. vol. xi. p. 114. Goodwin's Trial. [2] Supra, p. 31.
[3] North Am. Rev. vol. xiii. p. 154. [4] Reviewed, Ibid. vol. xxiv. p. 68.

He also vindicates the efficiency of the restrictive measures, by referring to the fact, that the repeal of the obnoxious British orders, which took place on the 23d June, 1812, was induced by the influence of the manufacturers, before it was known in Europe that war had been actually declared by us. The letter of 26th February, 1827, states that the declaration of war was recommended, in consequence of the peremptory statement of Lord Castlereagh, made officially through the minister at Washington, that the British orders would not be repealed, without a repeal of internal measures of France which did not violate our neutral rights. "The cause of the war lay, therefore, entirely on the British side. Had the repeal of the orders been substituted for the declaration that they would not be repealed, or had they been repealed but a few weeks sooner, our declaration of war, as proceeding from that cause, would have been stayed; and negotiations on the subject of impressment, the other great cause, would have been pursued with fresh vigor and hopes, under the auspices of success in the case of the Orders in Council."

The late President Monroe, the colleague of Mr. Pinkney in the negotiations at London in 1806, and his associate in the cabinet of Madison, placed at Mr. Wheaton's disposition the correspondence which had passed between them at the eventful period of their political connection; and, on his subsequent departure for Europe, he expressed in strong language his satisfaction at his appointment abroad, and sent to him a letter of introduction to Lord Holland, one of the English plenipotentiaries with whom those negotiations were conducted.

It was not till two years after the commencement of Mr. Adams's administration that Mr. Wheaton received, in the spring of 1827, without any previous intimation to him or his friends, an evidence of the confidence of the Federal Government, in his appointment as Chargé d'affaires to Denmark. The title was the one by which, at that time, all our diplomatic agents in Europe were designated, except in the few cases,

limited to the principal courts, at which envoys extraordinary and ministers plenipotentiary were employed. The antecedents of Mr. Wheaton, as the cursory notice of his previous life will have shown, had fully prepared him for the service on which he was about to enter, and might, with propriety, have induced his employment in the highest rank known to our diplomacy. Those places have, however, under our government, been usually accorded to those who have been prominent in local politics, rather than as the results of special attainments; and we have already adverted to the divisions in "The People's Party," which deprived Mr. Wheaton of the benefit of claims, derived from the distinguished part which he had, in New York, borne in the presidential election.

In going abroad, the new diplomatist was not entering on a world with whose habits and usages he was unacquainted. Besides his early European experience, the advantage which he possessed over most of his fellow-citizens, however distinguished in other respects, in having a knowledge of the languages and literature, as well as an acquaintance with the legal and political institutions of other countries, had caused his society, at all times, to be sought by enlightened foreigners. With many of those whom the downfall of Napoleon compelled to leave France, General Lallemand, Réal, St. Jean d'Angelly, General Bernard, all historical personages, he was on terms of intimacy. With the last named his acquaintance was, to the advantage of his country, renewed in Paris, where General Bernard, after many years' service in the United States, terminated his career under Louis Philippe, whose Minister of War he was.

Mr. Wheaton sailed for England, with his family, in July, 1827. Among the acquaintances which he formed in London were the philosopher of Queen Square Place and his literary executor, Dr. (now Sir John) Bowring, since conspicuous in the parliamentary history of his country and in her East Indian diplomacy, but then distinguished as well for his radical politics, as for his researches in the dialects of Europe least familiar to

his countrymen, and for his contributions to English literature from the Russian, Polish, Dutch and Spanish anthologies, to which he had just added translations from the popular Servian poetry. This association of a congenial character was continued under agreeable circumstances, as his investigations of the language and literature of Finland brought Dr. Bowring to Copenhagen, while Mr. Wheaton was occupying his own leisure in the study of whatever appertained to Scandinavia or its adjacent regions. To Jeremy Bentham, whose works, despite the peculiarities of the language, contain an exhaustless mine of intellectual ore, and whose denomination of "International Law," as applicable to the subject of the accompanying treatise, our author has adopted, he was particularly attached, as the prime apostle in the cause of legal reform to which his own attention had been so recently directed. Repeatedly partaking of his hospitality, at those dinners which, never extending beyond a single guest, were literally *tête-à-tête*, and which were the sole occasions that Mr. Bentham devoted to conversation on the great topics that occupied his mind, he found him "a charming old man, less dogmatical than he expected, who criticized the specimens of the New York Revised Laws that had been sent him, in a tone of great politeness, expressing himself satisfied with what the revisors had done, as far as they had attempted to go."

Mr. Wheaton arrived at Copenhagen on 19th September, 1827, as the first regular diplomatic agent from the United States to Denmark. The only minister who had preceded him was Mr. George W. Erving, who, in 1811, was appointed on a special mission, in reference to those seizures and condemnations of American vessels and their cargoes, which constituted the particular matters now confided to him.

Count Schimmelmann, a venerable statesman, who had been for more than fifty years in the public service, was Minister of Foreign Affairs, and by him Mr. Wheaton was very graciously received. He presented him to the king and royal family, by whom he was, at all times during his eight years' residence,

treated with a consideration, which attached rather to his distinguished attainments and personal character, than to the diplomatic rank with which he was invested, and which scarcely indicated his true representative character. This was the more flattering, in consequence of the nature of the reclamations which he was making, and which, as it will appear, were not all of a description to preclude discussion.

The government of Denmark was, at that time, absolute, without any restriction on the power of the monarch; but the rectitude of the king, Frederick VI., was universally admitted. He had entered on the administration as Crown Prince, in 1784. Count Schimmelmann, at their first interview, spoke of the king's paternal character; adding, "*mais il a été très malheureux.*" Both he and the King of Saxony, the most virtuous sovereigns in Europe, have been despoiled of their dominions." Alluding to the Court, Mr. Wheaton says; — "The king's character for *bonté* is uncontested. He enters into all the minutiæ of government, which, indeed, is no very hard task in a little kingdom like this. But he is any thing but a *roi fainéant.* The army is his hobby. The peasantry, though no longer serfs, are subject to military duty; every farmer's son, of mature age, being liable to serve six years. In the towns, all must serve in some corps; either the regular troops, or the burgher guard, or fire companies. In short, Denmark is Prussia in miniature. The king gives audience to *all* his subjects every Monday, when every man, woman, or child may present a memorial to him in person, or speak to him. They build a ship of the line, or one or two frigates, every year."

In writing, soon after his arrival, to the Editor, who was then in London, he says: — "I have made the acquaintance of several literary men, and have seen Professor Schlegel, among others, who, you will recollect, wrote in 1799 against Sir W. Scott's celebrated judgment in the case of the Swedish convoy. He appears to be a man of extensive learning in his profession. He is a judge (or rather assessor) in the High Court, and, at the

same time, a professor in the University, and the head of the Law Faculty. He has written in Danish on the history of legislation. There are here some men who are unknown, if not in the rest of Europe, at least with us, that deserve to be known; and, in general, the attainments of their *savans* are much more profound in what they pretend to a knowledge of, than with us; and I suspect generally, even in England, they do not go to work so doggedly and so perseveringly."

Among his associates will be found not only the names familiar to the literary and scientific world, — Rask, Oersted, and the poet Öhlenscläger, who made him the subject of some complimentary verses, — but others, whose fame less extended elsewhere, is equally eminent in their own country. The friendly communications of this period, besides those of the individuals already named, which accident has preserved, embrace letters from Münter, Bishop of Zealand, and his sister, Madame Frederika Brun; whose country-seat of Fredericksdal was the resort of all the distinguished of Denmark, — of Müller, the successor of Münter, Rafn, and Magnusen.

His diplomas, as a member of the Scandinavian Society and of the Icelandic Literary Society, as the sequel fully shows, implied no mere honorary distinctions. A letter from Schlegel, dated March 15, 1830, states his election to the former association to have been on his nomination, and at an extraordinary meeting held for the purpose. He adds: — "Tous les membres reconnurent votre mérite et le zèle avec lequel vous avez travaillé à répandre la connaissance des ouvrages Danois et de l'ancienne littérature du Nord dans les États-Unis d'Amérique."

The election to the Icelandic Society is communicated in a note from Rask, of the 22d of November of the same year; and it is even then placed on the ground of "his knowledge of the Northern History, his proficiency in the language, and his zeal in promoting the literature of Scandinavia."

Immediately on his arrival, he resumed those literary pur-

suits, which with him were always more or less connected with the study of his favorite science, now become a professional avocation. He imparted to his countrymen, through the pages of the North American Review, the first results of his investigations in the history, mythology, and jurisprudence of the Scandinavian nations. The article on the Public Law of Denmark, purporting to be a notice of the work of Schlegel, already adverted to as being written in Danish, and which appeared in America, when he had only been resident at Copenhagen for a twelvemonth, is no slight evidence of his having omitted no opportunity to prepare himself, by a knowledge of the language and institutions of the country to which he was accredited, for an efficient performance of his diplomatic functions.

In this paper not only are the institutions of Denmark — the *lex regia*, which regulated the succession to the throne, and conferred on the king the whole executive and legislative power, as well as the circumstances which went to limit the theoretical despotism of the monarchy through the *Höieste Rett*, explained, but the political connection with the kingdom of the duchies of Schleswig, Holstein, and Lauenburg, a subject which, several years afterwards, menaced the peace of Europe, is pointed out.[1] Into the philology of the Danish language he had so far entered at an early day, as to present, among his contributions, a notice of Professor Rask's grammar.[2]

The Public Law of Denmark was soon followed by an Essay on the Scandinavian Mythology, Poetry, and History, in which the sources of the materials, for the early history of the Gothic or Teutonic kingdoms of Norway, Sweden, and Denmark, are indicated.[3] These articles, with the subsequent ones, in reference to the ancient laws of Iceland[4] and the Anglo-Saxon language and literature,[5] with a glance at the antiquities of a widely

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[1] North Am. Rev. vol. xxvii. p. 285. See also Part I. c. 2, § 23, note *a*, p. 73.
[2] Ibid. vol. xxx. p. 558.
[3] Ibid. vol. xxviii. p. 18.
[4] Ibid. p. 556.
[5] Ibid. vol. xxxiii. p. 325.

different region and people, disclosed to the world in the unravelling of the Egyptian hieroglyphics, through the discoveries of Champollion,[1] and on which his friend, Professor Rask, had aided in throwing light, formed the suitable preludes to the classic work which, under the title of the "History of the Northmen, from the Earliest Times to the Conquest of England by William of Normandy," appeared in London and Philadelphia, in 1831. It was, on its publication, noticed with the highest commendation in the principal periodicals of Europe and America.[2] The review of it in the North American is from the pen of Washington Irving.

This book at once took a place among the standard works of the language, and after being enriched by the further investigations of Mr. Wheaton, for which the publication in Denmark of the Icelandic Sagas and the labors of Magnusen afforded new materials, it was introduced, in 1844, through the translation of M. Guillot, to continental readers. This edition, which received the particular notice of the French Academy, and which Mr. Wheaton, at the time of his death, was preparing for publication in English, was rendered specially interesting to the scholars of the United States, by the new light which it sheds on the Scandinavian discoveries in America, the authenticity of which it establishes.

In noticing the French edition, M. de la Nourais remarks:— "Mr. Wheaton is not only an historian, but in his Scandinavian researches he did not lose sight of the main avocation of his life, public law. It is as a publicist that he has investigated, interpreted, and almost always with a rare sagacity, the ancient monuments of the Scandinavian law; at the side of historical events he has known how to place the legislation of the people whose annals he recounts. It is principally in this point of

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[1] North Am. Rev. vol. xxix. p. 361.

[2] See, *inter al.*, North Am. Rev. vol. xxxv. p. 343. Monthly Review, vol. iii. p. 1. Amer. Quart. Rev. vol. x. p. 311. The London Athenæum, 1831, p. 453. The Westminster Rev. vol. xv. p. 442.

view that we consider the work of Mr. Wheaton within the scope of our labors. He makes known the laws and judicial customs of the people of whom he has rendered himself the historian.[1]"

An English contemporaneous notice says: — "Among the foremost of those who, in our own days, have furnished important contributions to our stock of Scandinavian literature, stands the name of Dr. Wheaton, a gentleman no less distinguished as a lawyer and statesman than for his historical and antiquarian attainments. The 'Histoire des Peuples du Nord' is less a translation than a new edition of his 'History of the Northmen;' it has been made under the eye of the author, and enriched by him with many notes and illustrations, and with an entirely new chapter, carrying on the History of the Northmen to the extinction of the Norman dynasty in the south of Italy."[2]

Baron Humboldt, the philosopher and traveller, to whom we shall hereafter have occasion to refer as the personal friend and intimate associate of the King of Prussia, as well as of our author, wrote to the translator: — "'L'Histoire des Peuples du Nord' est devenue, grace aux importantes additions de l'auteur, comme grace à vos soins et à votre pénétration, un ouvrage bien différent de celui qui déjà, dans sa forme primitive, avait obtenu le succès le plus merité. C'est un spectacle digne du philosophe, que cette civilisation refugiée, abritée, noblement agrandie dans un réduit du monde polaire, — cet aspect d'une colonie insulaire étendue sur un continent voisin, si différent par sa nature et des colonies Helléniques et de celles qui se rattachent aux besoins un peu prosaïques des siècles industriels. Je mets un double prix au don que vous avez daigné me faire, Monsieur, à l'interêt qu' inspirent des recherches, dont vous avez exposé la valeur dans la préface de l'ouvrage avec autant

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[1] Rev. Étr. et Fr. tom. i. N. S. p. 633.
[2] For. Quart. Rev. vol. xxxv. p. 76.

de gout que de sagacité, où l'importance historique se joint à la haute estime que dans ce pays on professe à la cour et dans les cercles littéraires, pour l'habile et vertueux diplomate que je suis fier de compter parmi mes amis les plus intimes. Citoyen de l'Amérique tropicale je peux m'enorgueillir de l'amitié d'un grand citoyen des États-Unis. Cette profession de foi est permise sur la colline très monarchique et très historique que j'habite." [1] And, at the same time, in a note to Mr. Wheaton, he said: — "Votre excellent ouvrage historique, augmenté de votre 'Scandinavie,' aura auprès du Roi tout l'attrait et le succès de la nouveauté. Je désire vivement que le roi offre au traducteur son image dans la grande médaille d'or destinée aux travaux méritoires dans les sciences et les arts."

Further fruits of his historical studies at Copenhagen also appeared, after he had quitted Denmark. The History of Scandinavia was published in 1838, in connection with Dr. Crichton. It contains what was intended by him as a sequel to the History of the Northmen, bringing down the history of Denmark and Norway from the extinction of the Anglo-Danish dynasty, in 1402, to the Revolution of 1660, including the affairs of Sweden, under the union of Colmar. It is proper to add, that, for the other portions of the work, Mr. Wheaton, the extent of whose contributions are pointed out in the Preface, is in no wise responsible.[2] And so late as 1844, there was an essay from his pen in the Review of French and Foreign Law, at Paris, of which he was a regular contributor, on the ancient legislation of Iceland.[3]

Nor was it to these subjects, in addition to the preparation of the works more strictly connected with his public pursuits, and

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[1] Baron Alexander Humboldt to M. Guillot, Sans Souci, 21st June, 1844.

[2] Scandinavia, Ancient and Modern: being a History of Denmark, Sweden, and Norway, &c.; by Andrew Crichton, LL. D., &c., and Henry Wheaton, LL. D., &c. Preface, p. 9.

[3] Législation et Instructions Judiciares de l'Islande, pendant le Moyen Age. Rev. Étr. et Fr. tom. i. N. S. p. 182.

which were not completed till his transfer to another mission, that the leisure which the intervals of business afforded was exclusively applied.

Mr. Wheaton had scarcely been established at Copenhagen, before he directed his attention to a revision of the Life of Pinkney, a new edition of which was published in Sparks's American Biography. The American Quarterly, at Philadelphia, to which he sent, in October, 1828, an Essay on Scandinavian Literature,[1] and a review of Depping's History of the Normans,[2] as well as the European journals, participated with the North American in his contributions to the periodical press. Among other papers, an Essay on the Danish Constitution was, in 1833, inserted in the Foreign Quarterly Review.[3]

The special subject confided to Mr. Wheaton was the obtaining of an indemnity for the alleged spoliations on our commerce by Denmark, during the latter years of the European war. At peace with all the world for eighty years, except a slight difficulty with Sweden; one of the parties to the convention of 1780 for the maintenance of the armed neutrality; and placed geographically at a distance from the contending belligerents, the participation of Denmark, in the hostilities growing out of the French Revolution, was, on her part, no voluntary act. Indeed, she had been, at the commencement of these wars, a common sufferer with the United States and other neutral powers, from the aggressions of the respective belligerents. The unprovoked violation of the law of nations, by Great Britain towards Denmark, in 1800 and 1807, by the bombardment of her capital and the seizure of her fleet in times of peace, when the only crime that could be alleged against her was the maintenance of an impartial neutrality, constitute two of the most wanton acts of flagrant injury, inflicted by a stronger on a weaker power, to be found in the annals of history.

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[1] Amer. Quart. Rev. vol. iii. p. 481. [2] Ibid. vol. iv. p. 350.
[3] Foreign Quart. Rev. vol. xi. p. 128.

Compelled by her conduct to assume the offensive towards England, and deprived, in a great measure, of her national marine, Denmark had recourse, mainly through private armed vessels, to reprisals against the commerce of her enemy; and though the Berlin and Milan decrees and the other edicts of Napoleon were never formally adopted, yet the execution of the instructions against British commerce, between 1807 and 1811, led to the seizure and condemnation of numerous American vessels. In the latter year, a special mission was intrusted to Mr. George W. Erving, who was measurably successful in arresting further condemnations. As regards past transactions, the effort was without avail, but an intimation was given that when the maritime war was terminated, the subject might be resumed. To prevent those matters passing into oblivion, on two occasions,—in 1818 and 1825, the attention of the Danish government was called to the cases, and in exchanging, in 1826, the ratification of the commercial treaty, a note was addressed by the Secretary of State to the Danish Minister, to preclude all idea of indemnity being abandoned by the United States.

The reclamations were respectfully entertained, though at first met by a plea of poverty. Writing to the Secretary of State, November 20, 1827, Mr. Wheaton says: — "You can hardly have an adequate notion how this country was impoverished by the war brought upon it by the unjust aggressions of England, and followed by the dismemberment of the kingdom, at the peace. If they had remained neutral, their commerce and navigation must have sensibly declined at the latter epoch. But when we consider that they lost, at a single blow, their navigation and all their capital engaged in commerce; that they made immense pecuniary sacrifices to the faithful observance of their alliance with France; that the kingdom, with its diminished territory, population, and resources, is now staggering under a debt of upwards of fifty millions of dollars, we cannot wonder at their reluctance to enter into new engagements. They have no means of replacing the capital thus lost. France,

after repeated evasions, has, at last, peremptorily refused to repay them a debt of the most sacred character, being for supplies furnished the French troops, beyond the stipulations of the alliance. This is their condition, although the king is a man of very simple habits, and observes the most praiseworthy economy in his household, and in other respects, except the army, which has been his hobby from his youth. But the former condition of the kingdom has entailed upon him a numerous pension list, and the burden of supporting establishments quite disproportionate to its diminished resources."

Partial indemnity, satisfactory to the claimants, for a class of the cases, was accorded at the close of 1827, and within two months of Mr. Wheaton's arrival. In January, 1829, the Minister of Justice, M. de Stemann, was united with Count Schimmelmann, to discuss with the American Plenipotentiary the means of an amicable adjustment of all the matters in controversy. This measure had been preceded by a declaration of the king's desire "to use every means to reduce the losses to which some American citizens had been subjected, by neglecting, without an intention on their part, those forms which would have served to protect their navigation and their strictly neutral transactions," and by putting Mr. Wheaton in possession of the register of sentences, with the grounds on which they were supported by the competent tribunals, from the year 1807 to 1812.

The appointment of the Danish Plenipotentiaries was made on the eve of the termination of the administration of President Adams; but, fortunately for the country, President Jackson, who was inaugurated in the following March, "did not," to use the language of an experienced senator, in reference to this transaction, "change the negotiator — did not substitute a raw for an experienced minister."[1]

Mr. Wheaton was met, as Mr. Erving had been at the out-

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[1] Benton's Thirty Years in the Senate, vol. i. p. 603.

set, with the pretension, that the final decrees of the highest tribunal could not be reëxamined, and that it would be a reflection on their character to suppose that they were not in conformity with the law of nations. It was no difficult task to show, that though the decrees were conclusive *in rem*, as regards the title of the property and as respects the subjects of Denmark, they could not be deemed so as between nations; but that, on the contrary, the right of a foreign government to demand redress against an illegal capture only arose after the failure to obtain justice, in the ordinary course, from the courts.[1]

The alleged grounds, on which the American vessels had been condemned, were, principally: 1. For having simulated papers; 2. For having French consular certificates, which the Danish government had been informed by that of France could only have been issued to vessels going direct to that country; and, 3. For being found under English convoy.

1. So far as respects simulated papers, it was a question of fact in each individual case, and involved no discussion of principles.

2. On the second point, besides the answer that a French consular certificate was a document not known to the law of nations, and which American vessels, certainly so far as regards Denmark, were not required to have, it was satisfactorily proved that the instructions to the French consuls to confine them exclusively to vessels going directly to France, was not received in America till after the date of the sailing of the vessels in question.

3. The sailing under English convoy presented a subject of consideration not so readily to be disposed of. And Mr. Wheaton, in giving, in the appropriate place in this work, the substance of the argument, by which he succeeded in accomplishing the object of his instructions, does not affirm as a prin-

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[1] Part IV., ch. 2, § 16, p. 460.

ciple, but presents as a proposition to be discussed, the liability to capture of neutral vessels sailing under enemy's convoy. He had, indeed, himself, as counsel in the Supreme Court of the United States, contended, in 1821, as appeared in his Reports, that sailing under enemy's convoy was cause for the condemnation both of vessel and cargo; and he had, then, referred to the correspondence with the Danish government by Mr. Erving, who, he said, admits the extreme difficulty of upholding the contrary doctrine, and only seeks to escape from it by contending that the rule could not be extended to vessels forced into convoy, or accidentally involved in the enemy's fleet. "And this," he adds, "may be readily admitted, without at all weakening the general rule."[1]

It was denied by the Danes, that our claims came within the exceptional cases. On the contrary, they contended that "the convoy was a matter of preconcert; that the American vessels being employed to procure naval stores from Russia, for the use of England, they first submitted to an examination before they were received under convoy, declined to submit to search by the other belligerent, and were defended by the convoy if of superior force, or endeavored to escape during the contest. If worsted, they still claimed their neutrality."

The naked question, of the effect of sailing under enemy's convoy, has never been passed on in the United States' Courts, except so far as it may be supposed to be involved in the decisions respecting the liability to capture of neutral property, on board of an armed vessel of the enemy, as to which, as we have seen, there were conflicting decisions in the British and American Admiralty Courts. But, it is proper to notice, that in his dissenting opinion, in the case of The Nereide, Judge Story lays down in strong language the liability to capture of all vessels under enemy's convoy, and supports himself by a decision of the Lords of Appeal in England; while in the case

[1] Wheat. Rep. vol. vi. p. 34. The Aimable Isabella.

of The Atalanta, in which the previous decision, allowing neutral goods to be shipped on board of an armed vessel of the enemy, is affirmed, Judge Johnson distinguishes between such a case and that of sailing under enemy's convoy.

The settlement of the claims, by a gross sum to be distributed by the American government itself, precluded any further investigation of the facts by a tribunal, whose authority was recognized by both parties; but it is understood that those convoy cases, which were admitted by the American Commissioners, were proved to have fallen within the exceptional classes, as stated by Mr. Erving, and that their being under British protection was the result of superior force. While the success of Mr. Wheaton, unaided by any hostile menaces, is enhanced by the doubt which attached to a portion of the reclamations, the general result affords the highest proof of the zeal and ability with which his functions were discharged. Indeed, it is only due to the truth of history to record, that without a minister, holding towards the king and the members of the Danish government the relations which Mr. Wheaton maintained, there would never have been an opportunity for those free discussions, to which, and not to any formal conferences, the fortunate termination of the business is to be ascribed. Such is the testimony borne by the agent, who represented the principal claimants, and on that account visited Copenhagen. Count Schimmelmann repeatedly told him, that he considered that "the American government had paid them quite a compliment, in sending them such a representative as Mr. Wheaton." And of the position which he occupied there, as well as of the friendly form which the negotiations assumed, no better proof can be given than is furnished by the following note, taken from among those from the Danish Minister of Foreign Affairs, which their daily intercourse induced: — "Je suis désolé, Monsieur, que votre indisposition me prive aujourd'hui de l'avantage de vous voir; ce n'étoit pas des communications officielles que j'étois chargé de vous faire, mais je

voulois aviser avec vous, Monsieur, sur le meilleur moyen de pouvoir les faire sans rétard, et avec l'espoir d'un favorable résultat. J'ai averti le ministre, M. de Stemann, de ce qu' une indisposition vous empêche de sortir, et ce ministre est intentionné de se rendre aujourd'hui chez vous, pour pouvoir vous entretenir sur l'objet en question."

A further evidence of this view of the case is to be found in the declarations of subsequent text-writers. Mr. Manning, one of the most recent of them among the English, in commenting on this negotiation, considers that the Danish instructions, under which the captures were made, were justified. Ortolan, friendly as he is to neutrals, declares that, apart from the circumstances which occasioned the complete success of the American negotiator, it cannot be said that the fact of a neutral vessel sailing under the convoy of a belligerent is not an irregular and illegal act; and Hautefeuille notices the remarkable character of the transaction which, while it accords an indemnity, stipulates that the Convention, it having no other object than to terminate all claims, "can never hereafter be invoked by one party or the other, as a precedent or rule for the future."[1]

The Treaty of Indemnity was signed on the 28th of March, 1830. By it, including what was paid in 1827–8, on account of the seizure, in 1810, of certain vessels at Kiel, (on the cargoes of which, though they were liberated, a duty in kind of fifty per cent. was imposed during the pendency of the proceedings,) and the renunciation of claims against the United States, about three quarters of a million of dollars were secured for our merchants. This was one fifth more than the American Minister was instructed to insist on. But, what was infinitely more important, Mr. Wheaton's treaty was the pioneer of the conventions with France and Naples. From those treaties millions were obtained for our citizens, and our right to redress was established for violations of neutral commerce, whose sole

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[1] See further, on this subject, Part IV., ch. 3, § 32, note *a*, p. 603.

palliation was the illegal acts of the opposing belligerents. And, in these last cases, it was also shown that, as long as a nation maintains the forms of external sovereignty, neither a change in the reigning dynasty, nor the plea of the preponderating influence of a powerful ally, can relieve it from its accountability to foreign States.

Besides calling the attention of his government, at an early period of his residence, to the duties imposed by Denmark on the vessels of all countries, in passing the Sound and Belts,[1] Mr. Wheaton was, in other respects, able to make his remote mission beneficial to American commerce. He was successful in obtaining some modifications of the quarantine regulations on vessels from America, which were, in 1831–2, more strictly enforced on account of the cholera, and as to which the decision of Denmark was particularly important, in consequence of her acting as the sanitary police for the several Baltic States. In this matter he was enabled, through his personal relations with him, to obtain the efficient coöperation of the Russian Minister at Copenhagen, Baron Nicolay.

In 1830, the Governor-General of the Danish Islands, Von Scholten, was deputed on a special mission to Washington, with a view to the arrangement of a treaty, as respected the trade between those colonies and the United States, to be based on a mutual reduction of duties. Mr. Wheaton's efforts were exerted to promote the objects of the mission, advantageous alike to the country which he represented and to that to which he was accredited. With a view to the adjustment of such propositions as were likely to be acceptable, many preliminary conferences were, by the invitation of the Danish Minister of Foreign Affairs, held by him with Governor Von Scholten.

Of the matters in Europe interesting to the United States, whether connected or not with his own legation, he was an attentive observer; and his suggestions, as well to his colleagues

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[1] Part III. ch. 4, § 9, note *a*, p. 244.

as to his government, were, at all times, valuable. The subject of our trade with the West Indies, which, on his entering on his duties, was a leading topic of discussion between us and Great Britain, has, by the recognition of the most liberal principles by that power in relation to her colonies, ceased to have the interest of a pending controversy. But it is, even at this day, worthy of notice that the Danish government, though urged by the British to accept the terms of the Act of Parliament of 1825, the non-compliance with which led to the temporary interruption of our intercourse with the West India Islands, declined to do so. The conditions proposed to powers having colonial possessions were much more favorable than those offered to the United States. It was only required of them, in order to participate in that trade, that they should grant to British ships the like privileges of trading with their colonies, as were granted to their ships of trading with the British possessions abroad; whereas it was made a condition that we, as having no colonies, should place the commerce and navigation of Great Britain, and of her possessions abroad, upon the footing of the most favored nation. The Danish government, nevertheless, refused the proposition, not knowing what might be the consequence of giving to the English the direct trade to Europe in their colonial produce, and fearing that such an absolute reciprocity might be very injurious to their navigation.[1]

It is satisfactory to learn, that the common sentiment of Europe approved of the decision of President Jackson, in treating as null the recommendation of the King of the Netherlands, which he had substituted for an award, in reference to the North-eastern Boundary line. The despatch of the Danish Minister at that court, which announced the royal decision, and which is stated to have surprised every one there, was sent to Mr. Wheaton for perusal by Count Schimmelmann. The Danish Envoy expresses the opinion, as being that generally entertained at the

[1] Notes of Conference with Count Schimmelmann, September 19, 1827.

Hague, that Mr. Preble's protest was suited to the occasion, and quite temperate and dignified.[1]

Though our claims were then still subjects of discussion, on the occasion of the selection of an arbiter, in conformity to the Convention of 1827, the King of Denmark was, after our first choice the Emperor Nicholas, the sovereign to whom the United States desired, in preference to all others, to submit the controversy. Nor can it be doubted that the knowledge possessed at Washington of the superior fitness of the Minister at Copenhagen, to conduct the reference on our part, was among the motives for placing Denmark second on the list.

In the instructions, given on that occasion, it is said: — "If the late Emperor of Russia was still living and on the throne, there would have been a great repugnance against a second application to him, to act as arbitrator between the parties, after he had once assumed the trouble of officiating in that character. But that objection does not apply to the Emperor Nicholas, who may possibly regard as a compliment the manifestation of the same high confidence in him which was entertained for his illustrious brother. It is probable, therefore, that he may accept the office. No well-grounded objection, on the part of Great Britain, can be anticipated. If, as now appears to us, at this distance to be highly probable from recent information, hostilities have been commenced with Turkey, the fact of Great Britain and Russia being allies, in the prosecution of that war, might render somewhat doubtful the expediency of our agreeing to the choice of the Emperor Nicholas as an arbiter. But, whilst that fact ought to prevent any objection to him on the part of Great Britain, it does not shake the confidence which the President would have in the impartiality and uprightness of his decision, if he should consent to serve."[2] And in a subsequent despatch, in answer to one from the American Chargé d'Affaires at London,

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[1] Mr. Wheaton to Secretary of State, February 19, 1831.

[2] Mr. Clay to Mr. Lawrence, 20th February, 1828.

stating objections, which subsequent events fully sustained, to the King of the Netherlands, on account of the comparatively dependent relation in which he stood to England, even before the division of the kingdom, and asking permission to substitute the King of Prussia as our third choice, the Secretary says:—"We are very desirous to learn whether you have come to an agreement for the designation of a sovereign arbitrator. I have nothing to add to former instructions on that subject. It is most desirable that the Emperor of Russia shall be agreed upon. And the King of Denmark would be our second choice. The President weighed all the considerations you have suggested, respecting the King of the Netherlands. They did not seem to him to overrule the confidence which he has in the intelligence and personal character of that monarch. As to the King of Prussia, the circumstance of our having no representative near him, was not without its influence on the omission of his name."[1]

In May, 1830, Mr. Wheaton visited Paris with his family, passing through the Hague, where he attended the deliberations of the States-General. He was very kindly received by the Minister of Foreign Affairs, the Baron Verstolk, and presented by him to the old king. This was a short time before the movement which severed the two portions of the kingdom of the Netherlands, which, he remarks, during his stay there, were then far from being consolidated. He was still absent from his post, at the time of the French Revolution of 1830, and we find, among his papers, a note from Lafayette, dated a few days before the outbreak, inviting him to Lagrange, as well as a memorandum stating his having dined, immediately after that event, at the Danish Minister's, with Barbé Marbois, who was then approaching four score and ten, and who, besides having experienced various vicissitudes during the first French Revolution, and been employed in eminent posts, both under the Em-

[1] Mr. Clay to Mr. Lawrence, 17th May, 1828.

pire and the government of the Restoration, is connected with our American annals, as the Chargé d'Affaires of Louis XVI., during our Revolution, and as the negotiator of the Treaty of Louisiana — whose history he has also written. It was during the memorable occurrences of this period, that Mr. Wheaton made the acquaintance of Louis Philippe, to whom he was presented by Lafayette, and whom he saw take the oath to the charter. The king, during the remainder of Mr. Wheaton's residence in Europe, on repeated occasions, though he was never accredited to his court, conferred freely with him on matters of state and government. With Guizot, Thiers, and the other distinguished men of the Orleans dynasty, who added the official rank of ministers to the highest eminence in the literary world, he was, by congeniality of pursuits, brought into association. With the Duke de Broglie he was on terms of the most friendly intercourse, as he was, also, with the historian Mignet, the Perpetual Secretary of the Institute for the Class of Moral and Political Sciences, and with most of the other celebrities, whose society contributes so much to the intellectual attractions of the French metropolis.

In 1831, Mr. Wheaton visited London by direction of his government, in reference to matters connected with the Danish indemnity. While in England, he not only availed himself of the opportunity of making the acquaintance of the Ministers of State and other public men, as well as of the diplomatic corps, to many of whom he was already known, but he was, at once, recognized as a member of their own fraternity by the most eminent in literature and law.

Among the statesmen by whom he was particularly distinguished on this and the other occasions of his visiting the British capital, were Lord Aberdeen, Lord John Russell, Sir Robert Peel, and Lord Palmerston, and especially the Marquis of Lansdowne. With Sir James Mackintosh, whose judicial independence, when presiding in the Vice-Admiralty Court of a distant possession, contrasted so favorably with the ministerial

subserviency of Sir William Scott, and who, in so many way was a congenial spirit, he was well acquainted.

Senior, who, by his able paper in the Edinburgh Review, afterwards contributed to place his merits, as a publicist, properly before the world, was one with whom he was on terms of intimate association, as he was also with Palgrave, Hallam, Hayward,[1] Mr. and Mrs. Austin, and others of like fame. It was at this period that the History of the Northmen was published, and the consideration which its author enjoyed in the literary circles of the metropolis, is the best test of its appreciation. He was, likewise, as a learned jurisconsult, requested to furnish answers to the queries of the common-law commission then in session, and who were occupied with the same investigations to which his own attention, as a commissioner at New York, had been directed.

In the autumn of 1833, Mr. Wheaton visited the United States. At New York, he was invited, by a committee of the most influential citizens, at the head of which was the

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[1] The following is the note, dated Temple, July 21, 1831, by which Mr. Hayward introduced himself: — "I take the liberty of requesting your acceptance of a translation which I have printed for private circulation, and the last number of a work of which I am the Editor. I have only just heard of your being in this country, or I should have hastened to offer my humble tribute of respect before; and I believe that I may venture to offer the same excuse for several of my friends, who, having interested themselves in foreign jurisprudence, (if such term can be extended to America,) would be naturally desirous of the honor of becoming acquainted with so distinguished a jurist as yourself. I chanced to breakfast this morning in company with Mr. Cooper, author of 'Lettres sur la Chancellerie,' &c., Mr. Sutton Sharpe, Editor of the 'Jurist,' and Mr. Miller, author of some approved works on law reform. I found each to be ignorant of your arrival, but each is desirous to offer you every attention in his power. Mr. Cooper, indeed, offered to call with me, but as our professional engagements would compel us to call at an hour when you would probably be out, I have thought it better to write. I beg leave to add, that if you should wish to become acquainted with the few literary lawyers we have, I shall be most happy to be the medium of introduction. I trust to your kind construction of the freedom of this address. Similarity of pursuit is allowed to dispense with ceremony on the continent, and, in the present instance, I venture to dispense with it here."

mayor of the city, as "a mark of their respect for his successful efforts, as a scholar and diplomatist, to sustain the reputation and interests of the country abroad," to partake of a public dinner.

He was also requested by "The New York Law Institute," an association composed of his old professional brethren and of those who had, during his absence, been called to the bar, to pronounce a discourse before them, at their anniversary, in May, 1834. Engagements, at Washington, prevented the delivery of the address, which was, however, prepared and subsequently published. The subject selected, as furnishing some of the fruits of his studies abroad, was the progress of the science of law in Europe, since the independence of the United States. After tracing what had been previously done on the continent, and giving a rapid analysis of the great quarrel in Germany, between the historical and philosophical schools, on occasion of the introduction, into the conquered countries, of the French codes, he concludes by awarding to Bentham the title of the greatest legal reformer of modern times.[1]

The principal object of Mr. Wheaton's visit was the prosecution of a suit, which had reached the court of ultimate resort, against his successor in the office of Reporter of the Supreme Court of the United States, who, by the publication of an abridged edition of his Reports, threatened to deprive him of the fruits of twelve years of arduous labor, on which — in accepting an appointment abroad, the compensation of which, it was well understood, would scarcely suffice for his current expenditure — he had relied as a future provision for himself and family. It is seldom that among literary men questions arise rendering necessary a reference to the technical provisions of the copyright act, and among publishers, even in cases for which the law does not provide, there is a respect generally paid to priority of

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[1] Rev. Et. and Fr. tom. viii. p. 243.

possession. It was reserved for a counsellor at law, vested with the confidence of the highest tribunal of the country, in the absence, in a foreign land, of a professional brother, to whose voluntary resignation he owed his place, to disregard all these honorable obligations.[1]

The legal points involved will be found discussed in Peters's Reports. The Court decided that there was no copyright by the common law in Pennsylvania, where the publication was alleged to have been made, especially since Congress had acted on the subject under the Constitution, and that the opinion of the Judges, as published by the Reporter of the Court, were not susceptible of being made private property; and, entertaining doubts, whether there had been a strict compliance with the requisitions of the statute, they remanded the case to the Circuit Court to ascertain the facts.[2] The decision, however, of a majority of the Judges, on the points of law, by reducing the claim of

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[1] What were the difficulties under which the reports were originally published, may be inferred from the following letters. Judge Story writes to Mr. Wheaton, May 25, 1816: "Respecting the publication of the Reports, which we most ardently and impatiently desire, I will converse with you when we meet. I am fearful that at present there is not a bookseller in Boston who is able to print them, or give any thing for the copyright. I can readily procure you subscribers." Mr. Duponceau says, in a letter, dated Philadelphia, June 3, 1816: "I have applied, without success, to most of the booksellers in the law way, who, after taking more or less time for consideration, have uniformly told me that they would not print the work; by which I understood that they would not give any thing for it, or at least any thing like what they thought you might expect. There is one more to be applied to, and another who has not yet given me an answer. I shall pursue my applications to the end, and let you know the result. Bookselling is at present a very bad business, and booksellers are all out of spirits, and unwilling to undertake an original work." Mr. Wheaton says, December 19, 1816, to Judge Story: "I beg you to believe (and will thank you to write Mr. Justice Washington to the same effect,) that the delay has been occasioned by causes beyond my control, and that others are responsible for it. I was ready for the press in six weeks after my return from Washington. It was not until the 17th June that I could find a bookseller to publish on any terms, and the delay since has been occasioned solely by Mr. Carey's failure to furnish paper, from time to time, as it was wanted by the printers."

[2] Peters's Reports, vol. viii. p. 591. Wheaton *v.* Peters.

Mr. Wheaton merely to a copyright in the marginal notes and arguments of counsel, and making all indemnity, even on account of them, dependent on affirmative proof of the technical performance of certain specified requirements, of which the public offices in those days afforded but imperfect means of furnishing the evidence, was a most severe blow to our author. The unsatisfactory result of the suit was, moreover, aggravated by the circumstance that this controversy led to the severance, for ever, of those friendly ties which had so long existed between him and Judge Story.

Mr. Wheaton returned, in August, 1834, to Copenhagen, and he refers, in a despatch of the 29th of November, to the accession, by Denmark, to the treaties of 1831 and 1833, between England and France, for the suppression of the slave-trade. He also states, that instructions had been given to the Governor-General to ameliorate the condition of the slaves in the West Indies; that any slave should be permitted to buy his freedom, whenever he was able to do so from the fruits of his labor, during the intervals allowed him for that purpose; and that any slave, who was discontented with his master, and could find a purchaser who was willing to buy him, might, in that way, change his master.

Though Mr. Wheaton's residence at Copenhagen was not at a capital where the earliest intelligence could be commanded; yet as the European governments are in the habit of furnishing their agents abroad, from time to time, with an analysis of the reports which they require to be made to them from all their legations, together with their own views of the pending occurrences, probably nowhere could he have had a better opportunity than at one of the northern courts, removed from the influence of the immediate actors, of studying the politics of the world, and of forming a sound judgment respecting the future course of international relations. The correspondence of Mr. Wheaton during the twenty years of his foreign residence, pointing out, as it does, the causes of events which

are yet, in many cases, cabinet secrets, would afford historical annals inferior in interest to no contemporaneous memoirs. A large portion of it for the first part of his Danish mission, was addressed, in the form of private or confidential communications, to the President and Secretary of State. So early as December, 1827, he appreciated the true position of Turkey, when, after the battle of Navarino, he writes: "I think we have only, as yet, the opening scene of a great drama, which is to be enacted in the Eastern world; and how the *dénouement* is to be brought about without a partition of the Ottoman Empire, I am at a loss to conjecture."

In a private letter to President J. Q. Adams, soon afterwards, (January 5, 1828,) he says: "Mr. Middleton has doubtless sent you a copy of the Russian circular, written after the battle of Navarino, in which the views of that court as to the affairs of the East are developed. That paper certainly looks to the probability of his Imperial Majesty being compelled (however reluctantly) to occupy the principalities of Moldavia and Wallachia, if not to advance further on the road to 'Byzantium.' But the evident interest of the other European States to oppose the territorial aggrandizement of Russia, and to support the tottering fabric of the Turkish power, induces a strong belief that some means will yet be found to induce the Porte to listen to the remonstrance of its 'friends.' If the Christian powers had acknowledged the independence of the Greeks three years ago, and labored in good faith to consolidate a real Grecian State to take the place of the Ottoman Empire in the balance of power, they would have adopted a much more sensible course than this their tardy interference, which will probably redound to the advantage of Russia only. But such a course would not have suited the views of Prince Metternich or of Mr. Canning, the latter dreading the creation of a new maritime power, which might rival that of England in the Mediterranean, as much as the former feared the example of successful resistance to oppression and the approximation of the Russian Colossus."

The circumstances, also, which were leading to a change in the internal constitution of Denmark, in accordance with the promises made at the period of the Congress of Vienna, but which only began to be redeemed in Mr. Wheaton's time, as well as the commencement of the difficulties in the Duchies, which afterwards menaced such fatal consequences to the integrity of the Danish States, are fully appreciated and explained.

At the early date of this letter to the President, he thus adverts to the sentiments of the people on that subject: — "In the *kingdom*, the natural desire of constitutional securities, now felt by every civilized people, is checked by the personal good character of the reigning sovereign and the mildness of his administration. In the Duchy of *Holstein* (which you will recollect forms a part of the Germanic Confederation,) there was, four or five years ago, a movement towards innovation, or rather towards a restoration of the former order of things in that country; the prelates and nobles having demanded the convocation of their ancient States. The king, not having complied with their demand, they made application to the Diet at Frankfort; but that body advised them to wait patiently for the constitution which his Majesty was preparing for them. Nothing has been heard of it since, and the *people* take the less interest in it because they consider it merely a selfish attempt on the part of the privileged orders to secure their feudal immunities, which are still very considerable. In conversation with a resident of the Duchy, on this subject, he observed that they might have a constitution of States if they would—'mais quel besoin des Etats, quand nous avons un si bon roi?'"

In his correspondence with President Adams, who himself united in a remarkable degree the pursuit of science and the cultivation of letters with his public duties, he entered into ample details of what the Danish government, notwithstanding its pecuniary embarrassments, was effecting for the advancement of knowledge in that remote corner of the globe. He

described the steps taking for the *cadastre* or grand survey of the kingdom, the geometrical part of which, so far as related to Holstein, was under the direction of the celebrated astronomer, Schumacher.

During the whole period of his mission to Denmark, the United States were not represented in Austria, Prussia, or any other part of Germany. As a resident at the court of a sovereign who, on account of Holstein, was a member of the Germanic Confederation, his attention was necessarily drawn to that important portion of Europe. His despatches not only speak of the political concerns of the Confederation and of the action of the Diet, but he gives us the origin of that commercial league, with which his subsequent career was, for so many years, connected.

Before leaving Denmark, on his visit to the United States, he had received from his Prussian colleague at that court, Count Raczynski, (to whom, as the historian of the Arts in Germany, we shall, in the sequel, have occasion to refer,) a communication, which his government had directed him to deliver to the American Chargé d'Affaires, with a view to its transmission to Washington. It expressed a desire for the restoration of diplomatic intercourse between the United States and Prussia, as well as intimated a wish that Mr. Wheaton, whose reputation was already established there, should be sent to Berlin. This appointment was, however, not made till the spring of 1835, when he was commissioned as Chargé d'Affaires to Prussia, by President Jackson.

A year before Mr. Wheaton's transfer, Mr. Buchanan, subsequently Secretary of State under President Polk, at the request of President Jackson, expressed to him his views of the proposed nomination. The following is an extract from his letter: "During my residence in St. Petersburg I had frequent opportunities of learning the character and standing of Mr. Wheaton at Copenhagen, and it is but justice to say, that they were such as to make a decided impression in favor both

of himself and his country. Baron Nicolay, the Russian Minister at that court, told me there was no member of the diplomatic corps who stood higher in public esteem. His character as an author is, I am inclined to believe, more justly appreciated abroad than at home, and would be the best introduction he could have at Berlin. Besides, he is well acquainted with German literature, and speaks the German language — two great recommendations among a people so proud of their origin as the Germans."[1]

There had been no American Minister at Berlin since John Quincy Adams, whose nomination was made in 1797. An appointment was now proper, not only as a matter of reciprocal courtesy, but the increased political importance of Prussia, and more especially the controlling influence which she exercised over the commercial interests of a great part of Germany through the Zollverein, required that the United States should omit no suitable opportunity of cultivating with her relations of mutual interest.

Mr. Wheaton arrived in Berlin, in June, 1835. The Minister of Foreign Affairs, Mr. Ancillon, at their first interview, requested him to suggest by what means our commercial connections with them might be extended. The articles of the Germanic Confederation, as established by the Congress of Vienna, in 1815, contemplated the regulation, by the Diet, of commercial intercourse among the States, as well as the free navigation of the great rivers; but nothing was ever done towards effecting the former object. The custom-house barriers had, however, been broken down between the individual States, by means of Customs' Unions, of which there existed at the time of Mr. Wheaton's arrival two, the Zollverein, at the head of which Prussia was, and which embraced most of the States of Germany, except the Austrian dominions, the Hanseatic Towns, the duchies of Holstein and Lauenburg, (belonging

[1] Mr. Buchanan to President Jackson, March 13, 1834.

to the King of Denmark,) Mecklenburg, Oldenburg, the kingdom of Hanover, and the duchy of Brunswick, which two last formed, in 1834, a separate commercial league, called the Stuerverein, with which, soon after, Oldenburg was united. As the principles, on which these associations were established, were a uniform tariff, the duties from which were to be collected by the frontier States, and divided among the different members according to their population, it was with the leagues rather than their individual members that negotiations were to be conducted. They were represented, so far as respected diplomatic discussions with foreign nations, by Prussia and Hanover respectively; and Mr. Ancillon early intimated his desire to the American Minister, that he should not attempt to approach the Zollverein with any overtures for commercial negotiations, except through Prussia, its founder and natural head.[1]

By his original instructions from the Secretary of State, Mr. Forsyth, his attention was specially directed to an establishment of commercial relations with Germany, founded on the new order of things, and also to the removal — for which the connection of many of the States with Prussia, through the Zollverein, would afford facilities — of the obstructions imposed on emigration by the existence of the droit d'aubaine et droit de détraction.[2]

Soon after Mr. Wheaton's arrival, he availed himself of the suspension of diplomatic business to make, in July and August, a tour through a portion of Germany. Proceeding by the way of Lubeck, Hamburg, and Hanover, to the Prussian provinces of Westphalia and of the Rhine, he collected a good deal of useful information respecting the commercial and other resources of those provinces, and of the intermediate States, as well as of Nassau, Hesse-Darmstadt, and Baden. He was furnished by

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[1] Mr. Wheaton to Secretary of State, 25 November, 1835.

[2] Mr. Forsyth to Mr. Wheaton, April 20, 1835.

Mr. Ancillon with introductions to the local authorities, who afforded him every facility for the prosecution of his inquiries. On his return to Berlin, Mr. Wheaton suggested to the American government separate negotiations with Prussia and her league, and with Hanover and her associated States; and he was in consequence instructed to inquire whether Prussia and the other German States united with her were disposed to open a negotiation with the United States upon their mutual commercial relations, with a view to an arrangement consistent with the great leading principles upon which our intercourse with foreign nations had been uniformly regulated, with such modifications and additional stipulations as the peculiar nature of the commercial union might render necessary.

Before any serious step was taken in the course of these negotiations, Mr. Wheaton was promoted, by President Van Buren, to the rank of Envoy Extraordinary and Minister Plenipotentiary. And contrasted as it was with the ordinary practice in such cases, to which we have alluded, and which afterwards governed his recall, it is here proper to refer to the magnanimity of the President in making this appointment, as well as to the obligations which the United States are under to Mr. Wheaton's old friend and associate, Benjamin F. Butler, a member of the Cabinet of Jackson, and always a confidential adviser of Van Buren, for his aid in securing to the country the continued services of our distinguished diplomatist.

It was, at the close of the session, immediately preceding the inauguration of President Van Buren, that an appropriation was made for the outfit and salary of a full minister to Prussia, instead of the salary of a chargé d'affaires, thereby rendering a new nomination for Berlin necessary. Mr. Wheaton had been, as we have seen, the pioneer in obtaining, under very peculiar circumstances, indemnity for reclamations from foreign States; and his treaty had been followed by eminent success in other negotiations. With his qualifications as a minister Mr. Van Buren had had the means

of being well acquainted, both as Secretary of State and while his colleague abroad, and in London he had had full opportunity to know the advantage which our country derived from his literary character and special attainments in the profession of diplomacy. On the other hand, not only were there, as usual, on the accession of a new President, many individuals, having pretensions from local influence and partizan exertions, who, not supposing a knowledge of public law or of the language and usage of diplomacy a necessary qualification on the part of those who are entrusted with our international intercourse, claimed all the patronage at the command of the Executive; but Mr. Van Buren had been the acknowledged leader in New York of that party which, in the contest of 1824, Mr. Wheaton had been so instrumental in defeating. It so happened, however, that the "Elements of International Law" had just been published, and though the work had not then acquired the celebrity which it now commands, it had attracted the attention of the Attorney-General, with whose peculiar duties the subject was directly connected. In the interchange of sentiment, which took place between Mr. Van Buren and Mr. Butler, even before the former had entered on his duties, adverting to the fact that, in addition to his other merits, Mr. Wheaton, alone of all those who, from the commencement of the government of the United States, had been employed in its diplomacy, had made a permanent contribution to the science of international law, and resting his claims on his personal qualifications, and on his eminent services in the negotiation of the Danish treaty, Mr. Butler urged the new President to disregard the clamors of ephemeral politicians, and while rendering justice to an experienced public officer, to do an act which would confer lasting honor on his administration. "All the respectable and intelligent portion of the community," he declared, "all whose good opinions are worth possessing will, at once, sanction your course, and all parties will soon approve of it." In this advice he was earnestly seconded by the venerable chief who was about retiring from

the government, and who had early manifested his own independence of action, by first retaining Mr. Wheaton at Copenhagen, and then transferring him to the more important post at Berlin. It is needless to add, that the counsel of his best and most disinterested friends, in which Mr. Van Buren readily concurred, meets no dissent in what may already be deemed the judgment of posterity.

Mr. Wheaton received his letters of credence, and his commission in his new capacity, in March, 1837; though owing to the vacancy in the department of Foreign Affairs, intervening between the death of Mr. Ancillon and the appointment of Baron de Werther, and the annual visit of his Majesty to the baths of Toeplitz, where he was accompanied by the new minister, he did not deliver his letter to the king till September. He thought that he could not better employ the interval than by making another journey through the Prussian provinces, with a view to complete his former examination of their commercial resources, especially with respect to the question of the tobacco duties, to which his attention had been particularly directed, and the natural and artificial communications, by which the States of Germany associated in the Commercial Union are connected with the North Sea, and the channels opened for our commerce, in common with that of other nations, through the ports of Belgium and Holland, into the interior of the continent. Leaving his Secretary of Legation in charge of the current affairs of the mission, he proceeded through the province of Brandenburg, which he had not before explored, to Cassel, the capital of Electoral Hesse; and he not only visited the States of Western Germany, but extended his tour through Belgium, where he had occasion to remark the improvements which had occurred under the new government since he first passed through it, in 1830, as well as to notice the intimate connection between the commercial interests of the United States and those of the Rhenish provinces, whose manufactures, in their diminished exports, were experiencing the effects of the monetary crisis, then prevailing in England and America.

The same instructions which conveyed to Mr. Wheaton his appointment, as Envoy Extraordinary and Minister Plenipotentiary, inclosed the report of a Select Committee of the House of Representatives, on the high duties imposed by foreign governments on tobacco; one half of the exports of which, from the United States, were consumed in Germany. Congress, also, had evinced the interest which they took in this trade, by making an appropriation for the compensation of special agents, to be employed for the express purpose of effecting a reduction of the tariff on this article; and it was understood that the rank of the Prussian mission was raised, with special reference to this subject. In the following year, (June, 1838,) a similar resolution was passed, requesting the President to instruct our diplomatic agents in Germany, to procure a reduction of the duties on American rice imported into the States of Germany, especially those associated in the Commercial and Customs' Union. Soon after the transmission of his commission, in June, 1837, Mr. Wheaton received a full power, with instructions from Mr. Forsyth, though preferring a relaxation of the duties by legislative or internal regulation, to conclude, if necessary, a treaty with the Zollverein, — an object which he ever zealously pursued for the ensuing six years. At this time, however, he was not authorized to stipulate for a preference in the ports of the United States of the productions of the German States, over similar articles imported from other countries, as an equivalent for the diminution of the duties or charges on tobacco; but if any such proposition was made, he was to transmit it to his government.[1]

The earlier instructions of Mr. Forsyth were, it should be mentioned, opposed to according any preference, even for a full equivalent, to the productions of Germany, lest we might thereby be embarrassed with those nations, with which we had treaties of reciprocity; and he referred to the difficulties which had, in

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[1] The Secretary of State to Mr. Wheaton, June 1, 1837.

consequence of such a provision, grown out of the convention for the purchase of Louisiana. That treaty not only contained a stipulation placing the vessels of France and Spain, laden with the productions of their respective countries, for a limited period, on the same footing as those of the United States in the ports of Louisiana, but provided that the vessels of France should be forever thereafter treated in those ports on the footing of the most favored nation. It was, Mr. Forsyth said, to get rid of obligations, which might be deemed to contravene the Constitution of the United States, which requires all duties to be uniform throughout the Union, that the preference accorded to French wines was inserted in the Treaty of 1831.[1]

As to the construction to be given to the term, "most favored nation," when used as in the Louisiana Treaty — whether it entitles a power, with which such a treaty exists, on the concession of advantages, for a consideration, to another, to enjoy them gratuitously, it may be remarked that the subject was fully, and, as it is believed, unanswerably argued, in 1817, on the American side, by Mr. Adams, in the controversy with respect to the very treaty referred to;[2] and the same views were always contended for by Mr. Wheaton, in his correspondence with the Department of State.[3]

Mr. Wheaton attended, under the instructions of his government, the Congress of the Zollverein at Dresden, in July, 1838. He presented to them a memoir, embodying all the statistical data and economical reasonings, which could tend to induce the introduction of a liberal policy. The importance to the Germanic Confederacy of the trade with the United States is fully explained, by a reference to facts as well as to general principles.[4] Statistical details do not enter into the plan of this

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[1] The Secretary of State to Mr. Wheaton, March 14, 1836.

[2] Cong. Doc. H. R. 18 Cong. 2d Sess. Doc. 91, p. 8.

[3] MS. Despatches.

[4] In the memoir, the consumption of North American tobacco, by the States of

notice, but how satisfactorily to those most deeply interested in the results, this branch of Mr. Wheaton's duties was performed, may be learned by the strong approbation with which it is alluded to in the report of a committee of the House of Representatives on the tobacco trade, and of which Mr. Jenifer, who was appointed, at the special request of the planters, Minister to Vienna, was chairman. The committee say, that "they cannot omit to notice the very able and argumentative memoir, presented to the Congress of Deputies of the German Commercial and Customs' Association, assembled at Dresden, in June last, by our zealous and talented minister, Henry Wheaton; in which he takes an enlarged view of the policy which should be adopted in relation to the products of the Southern States, and submits a project for their consideration, which the committee insert."[2]

Though Mr. Wheaton was not immediately successful, as regards the duties on tobacco, the consideration of which was adjourned to a Congress to be held the next year, he obtained a report in favor of the reduction of the duty on rice, which, on being referred to the respective governments of the States comprising the association, was confirmed by them. The only foreign relations considered at the Congress were those of the United States, arising out of Mr. Wheaton's memoir; and the favor which was accorded to his representations may be ascribed to the personal consideration which he commanded, and to the opportunities which his familiarity with the language of the members, as well as his thorough knowledge of the matters which he discussed, afforded him. By the ministers of state, as well as by their sovereigns, he was everywhere received as the honored representative of a great and powerful nation.

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the Zollverein, was then computed at 30,000 hogsheads, or 300,000 centners; of cotton, at 120,000 centners; and of rice, at 75,000 centners.

[2] Cong. Doc. H. R. 25 Cong. 3d Sess. Rep. Com. p. 310.

A confidential despatch gives an account of his interview with the King of Saxony, with whom he dined, on the 6th of July, at Pilnitz: — "His Majesty,[1] who is extremely well informed on all matters connected with the public administration, turned the conversation to the subject of our negotiations with the commercial association. He stated that Saxony had no particular interest in the question, as to the proposed reduction of the duties on American tobacco, either as to revenue or the cultivation of the native plant, whilst he admits that she had a deep interest in the preservation of a vast and increasing market for German manufactures. At the same time, the king did not disguise from me the difficulties we must expect to encounter, in endeavoring to reconcile so many conflicting interests, as are involved in any change of the present tariff. His remarks were conveyed in the kindest and most conciliatory terms towards our country, with whose resources he is perfectly acquainted, and for whose welfare he expressed the warmest interest, and with an earnest desire to cultivate the most amicable relations."

In the commercial treaty, of 1815, with Great Britain, reciprocity was established, so far only as regarded the trade between the United States and the British possessions in Europe, in the productions of the respective countries;[2] but in the case of

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[1] Frederick Augustus was born in 1797, became king in 1836, and died in 1853.

[2] By an Act of Parliament, 12 & 13 Vict. c. 29, (26th June, 1849,) the British government were authorized to accede to the proffer, made by our Acts of Congress, to all nations, of reciprocity, without reference to the country from whence the cargo came. President Taylor, in the annual message, December, 1849, says: — "In consequence of the recent alteration of the British navigation acts, British vessels, from British and other foreign ports, will, under existing laws, after the 1st of January next, be admitted to entry in our ports, with cargoes of the growth, manufacture, or production of any part of the world, on the same terms, as to duties, imposts, and charges, on their cargoes, as vessels of the United States with their cargoes, and our vessels will be admitted to the same advantages in British ports, entering therein on the same terms as British vessels." Annual Reg. 1849, p. 349. See Correspondence between Mr. Bancroft and Vis-

the treaties with the Hanseatic Republics, negotiated in 1827, and of the treaty with Prussia, in 1828, an unlimited right of importing, on equal terms into the respective countries, whatever might be imported therein in their own vessels, was reciprocally accorded. In the Prussian treaty it was specially declared, that the stipulations as to reciprocity shall apply, whether the vessels clear directly from the country to which they respectively belong, or from the ports of any other foreign country. This liberality, though it was only in accordance with the proffer made to all nations by our reciprocity acts, and of which several powers had availed themselves, had been deemed to operate very disadvantageously to American navigation in the case of the Hanse towns. This was supposed to be especially the case with regard to the importation of tobacco, which was made, to a great extent, through the port of Bremen, for Germany. It was stated that, from there being a great preponderance, in 1828, in favor of American vessels, in 1835 the difference in the tobacco trade alone was was six to one against our mercantile marine. This point was brought prominently to view in the report, which accompanied the resolution of the House of Representatives, on the subject of the tobacco trade, in 1837.[1] And it induced, in the treaty of commerce which Mr. Wheaton negotiated with Hanover, in 1840, a less extended reciprocity than had been adopted in the previous German treaties. The abolition of the discriminating duties, instead of applying universally, was confined, on the one side, to the productions of the

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count Palmerston, Parl. Papers, 1847, vol. lix. p. 901. The Queen, in her speech on the opening of Parliament, 1854, thus refers to the final change which was effected, during the session, in the policy of the British navigation system: — "I recommend to your consideration a bill which I have ordered to be framed, for opening the coasting trade of the United Kingdom to the ships of all friendly nations, and I look forward with satisfaction to the removal of the last legislative restriction upon the use of foreign shipping for the benefit of my people." Hansard's Parl. Deb. vol. cxxx. 3d series, p. 3.

[1] Supra, p. xciii.

United States and the American Continent and the West Indies, and, on the other, to the productions of Hanover, of Prussia, and of the States belonging to the Germanic Confederation.[1] This arrangement was in accordance with a suggestion made in a private letter of Mr. Wheaton to the President, in February, 1838, explaining the operation of the provision. The treaty was made with Hanover alone, the government of that kingdom having declined to negotiate conjointly with their commercial allies, as at first proposed.[2]

Mr. Wheaton gives the following view of our commercial relations in the North of Europe, on the conclusion of the treaty of 1840: — "The principal seaport of the kingdom of Hanover is Embden, which formerly carried on a considerable foreign commerce, so long as the province of East Friesland belonged to Prussia, and so long as the Prussian flag enjoyed the privileges and advantages of neutrality, during the wars of the American and French Revolutions. The imports and exports of the kingdom of Hanover are principally made through the ports of the Hanseatic Republics of Bremen and Hamburg, the former of which is *enclavé* within the Hanoverian territory. As the duties of import and export payable in those places are trifling, and as the transit duty across the Hanoverian territory, whether

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[1] U. S. Stat. at Large, vol. viii. p. 554.

[2] The restriction is not contained in the existing treaty with Hanover, concluded in 1846, which places vessels of both nations in every respect on the same footing, in regard to importations of foreign merchandise, as to duties on tonnage and cargo. The treaty, also, contains other important provisions; among them one that no higher duties shall be imposed at Brunshausen or Stade on vessels of the United States, than on those of Hanover, and a stipulation for the conditional abolition of the Weser tolls. It abolishes import duties on raw cotton, and transit duties on it and other specified articles. This treaty, which suspends that of Mr. Wheaton, was made for twelve years, with the usual provision for its continuance thereafter, till terminated by a year's notice; and with a reservation that, in the event of Hanover's raising her duty on tobacco, which she was authorized to do on a notice of a year, (and which she has done,) the United States should have the option, on a notice of six months, either to abrogate the treaty or continue it. U. S. Statutes at Large, vol. ix. p. 866.

by land, or by the Eems, the Weser, and the Elbe, to and from the countries united in the great Prussian Association of Commerce and Customs, is very moderate, the facilities of foreign commerce with the interior of Germany are proportionally great. The participation of the United States in this commerce, on terms of reciprocity, will now be secured by treaties with Denmark, Prussia, the Hanseatic Towns, Hanover, and the Netherlands, placing their navigation and commerce on a footing with the national navigation and commerce, in all the ports of the North Sea, from the mouths of the Rhine to Tonningen, and of the Baltic, from Memel to Kiel, excepting those of Oldenburg and Mecklenburg-Schwerin, in which it still rests on the President's proclamation, issued under the Act of 1828."[1]

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[1] Mr. Wheaton to the Secretary of State, May 20, 1840. The Act of March 3, 1815, c. 77, (U. S. Statutes at Large, vol. iii. p. 224,) repeals the discriminating duty on tonnage between foreign vessels and vessels of the United States, and between goods imported into the United States in foreign vessels and vessels of the United States, so far as respects the produce or manufacture of the nation to which such foreign ships or vessels may belong, — such repeal to take effect in favor of any foreign nation, whenever the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nation, so far as they operate to the disadvantage of the United States, have been repealed.

The Act of January 7, 1824, c. 2, (Ibid. vol. iv. p. 2,) suspends the discriminating duty between foreign vessels and vessels of the United States, so far as respects vessels of the Netherlands, Prussia, the Hanseatic Republics, Oldenburg, Norway, Sardinia, and Russia, and also the discriminating duties on the produce or manufactures of the territories in Europe of any of the said nations, or on such produce and manufactures, as can only be or most usually are first shipped from a port or place in the said territories in Europe, of either of them respectively, the same being imported in vessels truly and wholly belonging to the subjects or citizens of each of the said nations respectively, the vessels of each nation importing its own produce and manufactures, as aforesaid. This suspension to continue so long as the vessels of the United States and their cargoes, the produce and manufactures of the United States, laden therein, shall be exempt from like discriminating duties in their ports. The President to issue a proclamation of reciprocal exemption, on evidence of any foreign nation abolishing discriminating duties on vessels or goods of the United States.

The Act of May 28, 1828, c. 111, (Ibid. p. 308,) provides, that where no discriminating duties of tonnage or impost are levied in the ports of any foreign nation upon vessels of the United States, or on the produce or merchandise imported into

At the extra session of the Congress of the United States, in May, 1841, a report from the Secretary of State, Mr. Webster, respecting our commercial relations with the Zollverein, was laid before the two houses with the President's message. The materials from which it was compiled were furnished by the despatches of Mr. Wheaton, as were also those used on the subject of the Sound duties, which was embraced in the same

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the same from the United States, or any foreign country, the President may issue his proclamation, declaring that the foreign discriminating duties of tonnage or impost, within the United States, shall be suspended and discontinued, so far as respects the vessels of the said foreign nation, and the produce and manufactures imported into the United States in the same from the said foreign nation, or from any other foreign country, the said suspension to take effect from the time of such notification being given to the President of the United States, and to continue so long as the reciprocal exemption of vessels, belonging to the citizens of the United States, and their cargoes, as aforesaid, shall be continued, and no longer.

By the Act of May 31, 1830, c. 219, (Ibid. vol. iv. p. 425,) it is enacted, that from and after 1st of April then next, all acts and parts of acts imposing discriminating duties upon the tonnage of the ships and vessels of any foreign nation, so far as the same relate to the imposition of such duties, shall be repealed. Provided that the President of the United States shall be satisfied that the discriminating or countervailing duties of such foreign nation, so far as they operate to the disadvantage of the United States, have been abolished.

By the Act of July 13, 1832, ch. 207, § 3, (Ibid. vol. iv. p. 579,) whenever the President is satisfied that the discriminating or countervailing duties of tonnage levied by any foreign nation on the ships or vessels of the United States, shall have been abolished, he may direct that the tonnage duty on the vessels of such nation shall cease to be levied in the ports of the United States, and cause any duties of tonnage levied on the vessels of such foreign nation, subsequent to the abolition of its discriminating duty of tonnage, to be refunded.

Proclamations were issued by the President, previous to any treaty with them, under the Act of 1815, in favor of Bremen, Hamburg, and Lubeck, on 24th July, 1818, 1st August, 1818, and 4th May, 1820, respectively, (U. S. Stat. at Large, vol. iii. p. 792–3); in favor of Norway, on 4th August, 1821, (Ibid. p. 795); Oldenburg, 22d November, 1821, (Ibid.) Under the Act of 1824, in favor of Hanover, on 1st July, 1828, (Ibid. vol. iv. p. 816); Austria, 11th May, 1829, (Ibid.) Under the Act of 1828, in favor of Austria, (Ibid. p. 814.) Oldenburg, 18th September, 1829, (Ibid. p. 815); Mecklenburg-Schwerin, 28th April, 1835, (Ibid. p. 818); Tuscany, 1st September, 1836, (Ibid. p. 819); Brazils, 4th November, 1847, (Ibid. vol. ix. p. 1001); Chili, 1st November, 1850, (Ibid. p. 1004.)

report, and the information concerning which had been communicated by him from Copenhagen and Berlin. In this document the suggestion is distinctly made, of entering into commercial treaties with the States united in the commercial league, as well with a view to the extension of our trade with them, as of abrogating the taxes in the character of droit d'aubaine and droit de détraction, which existed in many of them.[1]

In 1842, Mr. Wheaton again attended a meeting of the Congress of the Zollverein, which was held at Stutgard, where he was presented, on the 15th of July, to the king, an enlightened sovereign,[2] who was duly sensible of the importance of cultivating commercial relations with the United States, and with whom he had a very interesting interview on that subject. On that occasion, he also visited Munich, and had several conferences with Baron de Gise, the Minister of Foreign Affairs of his Bavarian majesty, in relation to the commercial interests of Germany, and of its intercourse with the United States. In the discussions at Stutgard, he found, as had been the case on the former occasion, that the Deputies were unwilling to make any changes in the tariff, unless accompanied by corresponding reductions in the United States, on the productions and manufactures of Germany; insisting that their tariffs on tobacco were not higher than those of other countries, while cotton was admitted free of duty, and other American imports at a moderate rate. Tobacco was not, they said, a monopoly, as in France, and the duties laid on it are not equal to the one twelfth of those imposed in England. They all expected to receive from us some advantages for their manufactures, in exchange for the facilities they accorded to us; and it had been early objected, that our Treaty of 1831, as regarded French wines in the United States, interfered with the consumption of those of Germany.

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1 Webster's Works, vol. vi. p. 407.

2 William I., born in 1781, and who became king in 1816.

After the adjournment of the Congress, the embarrassments to making a treaty were increased by the serious augmentation, in the American tariff of 1842, of the duties on articles usually imported into the United States from Germany, and for which retaliatory measures had been suggested. Indeed Mr. Wheaton writes, under the date of 16th of November, 1842: — "Baron Bulow has recently stated to me that the Prussian cabinet had been invited, by some of its allies in the Germanic Customs' Association, to concur in measures of retaliation against our tariff, which is much complained of as too fiscal, and even prohibitive, of many German commodities. He intimated that Prussia was not disposed, at present, at least, to take such a step, but would await the result of the deliberations of our Congress, at the ensuing session, to determine the course of policy which the association ought to pursue."

The Congress of the Commercial Union held a session at Berlin, in September, 1843, and during it Mr. Wheaton was given to understand that a convention could be made for the reduction of the duties on tobacco, based upon equivalent reductions in the American tariff on German products and manufactures, and which might be selected from those articles which did not come in competition with the manufactures of the United States. These views were embodied in official notes between him and Baron Bulow, of the 9th and 10th of October. He takes occasion, in his despatch of 11th October, 1843, transmitting these notes, to refer to former despatches, in which he refutes the idea that any reduction of duties made for equivalent reductions by the Zollverein, would accrue gratuitously to the benefit of those countries who have treaties with the United States, stipulating to place them on the footing of "the most favored nation." At the same time, he stated that there was no obligation, on our part, not to make the proposed reductions in duties applicable to imports from other countries as well as Germany.

The assent of the Secretary of State, Mr. Upshur, was imme-

diately accorded to the proposed course, and Mr. Wheaton was directed to proceed with the preliminary arrangements, "bearing always in mind, that the sanction of Congress, as well as of the Executive, will be indispensably required, before we accomplish the object in contemplation." In a despatch of December, 1843, Mr. Upshur says: — "It gives me pleasure to say that the President entirely approves of the preliminary steps which you have taken, as stated in your communication of the 11th of October, to make the commercial arrangement with the German Customs' Union; and I now transmit, by his direction, a full power, authorizing you to proceed with the negotiations." Again, on 2d January, 1844, he adds: — "It is now the wish of the President that you should, without loss of time, bring these negotiations to a conclusion, on the basis of the notes of 9th and 10th of October last, which passed between you and Baron Bulow. As to the mode in which these arrangements are to be carried out, whether by agreement, convention, or treaty, the President has such confidence in your judgment, that he leaves it to you to adopt that which, in your opinion, will be likely to effect the object, in a manner most acceptable to both countries; the earnest wish of the President being to place the commerce between the United States and Germany, as speedily as possible, on the most favorable footing for both countries."

Before the last of these instructions were given, the President (Mr. Tyler) had, in his annual message to Congress, at the session of 1843–4, referred, with satisfaction, to these negotiations with the Zollverein, then embracing more than twenty German States, and 27,000,000 of people, and especially to the reduction of the duty on rice, and to the strong disposition evinced to reduce the duty on tobacco. "This," he says, "being the first intimation of a concession on this interesting subject, ever made by any European power, I cannot but regard it as well calculated to remove the only impediment, which has so far existed to the most liberal commercial intercourse between us and

them. In this view our minister at Berlin, who has heretofore industriously pursued the subject, has been instructed to enter on the negotiation of a commercial treaty, which, while it will open new advantages to the agricultural interests of the United States, and a freer and more expanded field for commercial operations, will affect injuriously no existing interests of the Union." Accompanying the message was a report of the Secretary of State, to which were annexed the notes of Mr. Wheaton and Baron Bulow, giving the outline of the proposed arrangement, and in which Mr. Upshur states that "the basis of a treaty had been agreed upon, and submitted for the consideration and action of our government, which would effect the long-cherished object of procuring the reduction of the present duty on our tobacco, secure the continued admission of our cotton free of all duty, and prevent the imposition of any higher duty on rice. For these vast advantages, the conditional arrangement proposes that the United States shall give the Customs' Union proper equivalents, by reducing the heavy duties of the present tariff upon silks, looking-glass plates, toys, linens, and such other articles, as are not of the growth or manufacture of the United States."[1]

The treaty was signed on the 25th of March, 1844. Its peculiar provisions were reciprocal stipulations, with regard to the rate of duties on various articles, therein enumerated. The United States, on their part, agreed not to impose on certain articles, the produce or manufacture of the States of the Germanic Confederacy, duties exceeding 20 per cent. *ad valorem*, nor, on others, duties exceeding 15 per cent., and on a third class they were not to be more than 10 per cent. They further agreed not to increase the present duties on the wines of Prussia nor to impose higher duties on the wines of the other States of the Confederation than on those of Prussia. The Zollverein were,

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[1] Cong. Doc. H. R. 28 Cong. 1st Sess. Doc. 2, p. 19.

on their side, to reduce the duties to a stipulated rate on tobacco and lard, and not to raise the present duties on rice, and not to impose any duty on unmanufactured cotton. These reductions of duties were only to apply to goods, laden on board of the vessels of one of the contracting parties, or of vessels placed on the footing of national vessels by the laws or treaties, respectively, of the contracting parties, and imported directly from the ports of the one party into the ports of the other. But the States of the Germanic Association of Customs and Commerce reserved the right to consider the ports between the mouths of the Elbe and Scheldt, inclusive, as ports of the association. The conclusion of the treaty induced, at once, the most flattering congratulations from Mr. Wheaton's colleagues at St. Petersburg, Copenhagen, and London.

Mr. Erwin, in apprising Mr. Wheaton from Copenhagen, in a letter of March 1, 1844, of the efforts by England to prevent Hanover from joining the Zollverein, says: "The conventional commercial arrangement made by you with the King of Prussia, on behalf of the Zollverein, has excited deep interest here as well as elsewhere throughout Europe. The achievement being truly regarded as among the most important of modern times, may naturally be supposed to have aroused the jealousy of those powers with whose interests it might seem to conflict; — a jealousy that would scarcely be diminished by the announcement in Mr. Upshur's able report of the probable accession to the union of Hanover and the smaller States of the north, by which an addition of more than three millions would be included in your beneficial arrangement."

Mr. Everett writes from London, on the 9th of April, 1844: "I repeat my congratulations on this brilliant result of your labors. Whatever may be the action of the Senate and House of Representatives as to ratifying and carrying it into effect, there can be but one feeling as to the ability with which you have conducted the negotiation." He at the same time, advised him of the jealousy entertained by the British government of

the result of the negotiation and of the construction which Lord Aberdeen was attempting to give as to its effect on our treaty with England, by claiming under it a participation in the advantages stipulated to the Zollverein, without rendering any correspondent equivalent.

On the 29th of April, 1844, the President transmitted the treaty to the Senate, and in his message he declares that he "cannot but anticipate from its ratification important benefits to the great agricultural, commercial, and navigating interests of the United States."

The subject was referred, in the Senate, to the Committee of Foreign Affairs, who, after it had been once recommitted to them, reported against it; and it was on the 15th of June, ordered to lie on the table, which, at that period of the session, and with the provision that the ratifications should be exchanged at Berlin within four months from the signature, was equivalent to a rejection. This was effected by a strictly party vote of twenty-six to eighteen. The objections made to the treaty are thus summarily stated: "In the judgment of the committee, the Legislature is the department of government by which commerce should be regulated and laws of revenue passed. The Constitution in terms communicates the power to regulate commerce and to impose duties to that department. It communicates it in terms to no other. Without engaging at all in an examination of the extent, limits, and objects of the power to make treaties, the committee believe that the general rule of our system is, indisputably, that the control of trade and the function of taxing belong, without abridgment or participation, to Congress. Upon this single ground, then, the committee recommend that the treaty be rejected." They then proceed to deny the importance of the stipulated concessions, in comparison with the equivalent considerations.

Before the conclusion of the treaty, a vacancy had occurred in the Department of State, by the death of Mr. Upshur, who, together with the Secretary of War and other distinguished

citizens, was, on the 28th of February, while on board of the steam frigate Princeton, killed by the explosion of a Paixhan gun, to test which was the object of the excursion. This event was of more importance to Mr. Wheaton than the mere severance of official relations, as it was understood that, had the Secretary lived, he would have gone to Berlin, and that Mr. Wheaton would have been transferred to Paris, on the conclusion of the Zollverein negotiation.

John C. Calhoun, the distinguished statesman of South Carolina, and between whom and Mr. Wheaton, twenty years previously, as we have seen, the most intimate relations had subsisted, was appointed in Mr. Upshur's place. The public despatch of Mr. Calhoun, cited in our notes,[1] meets the objections, which had been interposed in the Senate to the ratification of the Zollverein Convention, showing the uniform practice to be otherwise than as stated by the committee, (of which, indeed, the late reciprocity treaty, in relation to our intercourse with the British provinces, is a further illustration,) and that the only question that ever was made, on this point, was whether an act of Congress to sanction and carry into effect the stipulation of such a treaty was necessary; while a private letter, written a few days subsequently, sufficiently explains the true cause of the proceedings of that body. It was found among the papers of Mr. Wheaton, and the time which has elapsed, together with the death of all the parties to be affected by it, renders it, it is conceived, a proper contribution to the history of the period.

"[Private.] WASHINGTON, 28th June, 1844.

"MY DEAR SIR,

"The omission of the Senate to act finally on the treaty with the Zollverein States is at once a subject of deep regret and mortification; — regret on account of the advantages it

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[1] Part I. c. 2, § 23, note *a*, p. 75.

promised to both parties, and which it is feared may be lost, and mortification on account of the effects it may have on the standing of the government abroad. The cause, to which it is to be attributed, is doubtless the same as that to which the defeat of the Texas treaty may be, excepting in the former the operation of the protecting interest. But, I do not think that, of itself, would have been sufficient. You will see that it is not even alluded to in the report of the committee. The true cause in both cases I believe to be, the bearing which it was feared it would have on the Presidential election. Mr. Clay's friends, who are a decided majority in the Senate, felt confident of his election, under the old issue, as it stood when Congress met; and were averse to admit any new question to enter the issue. The attempt to prevent it has been in vain; and will prove unwise, even in a party point of view. The Texas question has entered deeply into the issue, and I have no doubt that questions growing out of the Zollverein treaty will also. Nor would I be surprised, if he should be beaten, in consequence of the part which his friends in the Senate have acted, as weak, personally, as the candidate opposed to him is comparatively.

"I cannot but hope that the treaty would be sanctioned by the Senate, should the time be prolonged to the next session, when the Presidential election will be over, and the party motives that have led to laying the treaty on the table, shall have passed away. I am strengthened in this opinion from the very inconclusive reasons assigned by the committee on foreign relations for its rejection, and which I feel confident the Senate will never sanction, whatever may be the fate of the treaty.

"Under this impression you have been instructed to have the time so extended as to afford the Senate an opportunity, at the next session, to act finally on the treaty, unless there should be a decided disinclination on the part of Prussia and other Zollverein States to the extension, which I fear may be the case. If such should be the fact, it strikes me that it would be very

indelicate, on our part, to press it. It would be doubly mortifying to us, and still more offensive to Prussia and the other States of the league, if it should be rejected, should we press against their inclination, the extension of the time for the exchange of ratifications.

"Let what may be the fate of the treaty, you can lose no reputation, as an able and successful negotiator. In making the treaty, you have effected what could have been accomplished by few, and what, if it should be consummated, would constitute an era in our commercial history. I cannot doubt it would tend, by its consequences, to other and great changes in the commerce of the civilized world, and lay a solid foundation for an intimate and close commercial and political union between the United States and Germany, which I greatly desire, and which I do not doubt would be for the mutual advantage of both. With great respect,

Yours truly,

J. C. Calhoun."

"Hon. Henry Wheaton."

The attempt to extend the time for the ratification was, as might have been expected, unsuccessful. And the administration which, in the ensuing March, succeeded that of President Tyler, refrained from any further proposition to alter, by treaty, the provisions of the tariff. The last meeting of the Zollverein Congress, during Mr. Wheaton's mission, was held at Carlsruhe, in October, 1845, without making any alteration in their tariff, and without any questions arising as to the commercial relations with the United States.

Before the fate of the Zollverein treaty was known, an overture was made by the Hanoverian Minister, at Berlin, for a negotiation for the admission of our tobacco and other agricultural products, on the most favorable footing, in return for a reduction of duty on linens alone.

Mr. Wheaton's view of the impolicy of the Senate's action

is thus succinctly given, in a private letter of December, 1844: — "I still continue impressed with the idea that the only safe and advantageous mode of arriving at a modification of the present tariff — which must inevitably take place during the ensuing administration, is by reciprocal concessions, to be stipulated with other nations — in which we should "gain both by what we give and by what we get," as it has been well expressed. The consequence of not ratifying the treaty at the last session is, that the European States are now looking for a gratuitous reduction of our tariff, by which their fabrics will be relieved from the present exorbitant duties, and our agricultural products will still continue to be subjected to the present heavy imposition in the European markets. This, I know, to be the impression in London, Paris, and Berlin. The two former cabinets would have been prepared to enter on similar negotiations with us had the Zollverein treaty been ratified."

The union, which has been effected between the States of the Zollverein and Steuerverein, has increased the population subject to the Zollverein to thirty-five millions, which, with the treaty stipulations between the Prussian league and Austria and her associates, all of whom, at no distant period, are likely to be blended in one Commercial Union, would have secured to us, not dependent on the mutable policy of legislation, but by an international convention, a market, with seventy millions of people, for our cotton free of duty, for our rice at the most reduced rates, and for our tobacco on terms that would have greatly increased its consumption.

All this might have been obtained in return for merely nominal changes in our tariff, while the augmented transactions between the United States and these seventy millions would have tended further to favor the emigration of a frugal and industrious people for the settlement of the almost indefinite territory, which still awaits cultivation and civilization, as well as to strengthen friendly intercourse between us and the great Federal empire, not unlikely, despite the abortive efforts at

Frankfort, in 1848–9, the rivalry between Austria and Prussia, and the intervention of other powers, to grow out of the Commercial Unions. Such a confederacy, however differing from us in its internal or municipal institutions, must resemble the United States, and have sympathy with them, from the analogous federal relations, connecting the several parts.

Besides the improvement of our commercial relations generally, Mr. Wheaton's original instructions contemplated the abolition of the *droit d'aubaine* and *droit de détraction*, as operating most injuriously on emigration to the United States. With Prussia the arrangement had been made, by the Treaty of 1828, and the same provision was introduced in the treaty of commerce with Hanover, in 1840; but the full power which had been given in 1836, to conclude separate conventions with the several States of Germany, was withdrawn, soon after it was granted, in consequence of the refusal of the Senate to ratify a similar one with Switzerland;[1] and it was not till Mr. Upshur was charged with the State Department, that, by instructions of November 18, 1843, it was renewed. Treaties were made, in pursuance of these instructions, with Wurtemburg, Hesse Cassel, Saxony, Nassau, and Bavaria. Baden declined making any, in consequence of the vested interest which some of her subjects had in these duties. All these conventions abolish the *droit de détraction*. In transmitting one of them, Mr. Wheaton says: — "The tax imposed on the funds removed by emigrants, who leave this country, amounts, in Saxony and most of the German States, to ten per centum on the capital thus transferred. This amount is so

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[1] A new convention with the Federal Executive of the Swiss Confederation, "for the mutual abolition of the *droit d'aubaine* and taxes on emigration," was concluded at Washington, on 18th of May, 1847. It is essentially the same as those negotiated by Mr. Wheaton, as hereinafter mentioned, with the German powers. U. S. Statutes at Large, vol. ix. p. 902. See, also, in addition to the treaties referred to in Part II. c. 2, § 4, p. 119, note, a treaty with the Sandwich Islands, December 20, 1849, (Ibid. p. 979); and one with New Grenada, December 12, 1846, (Ibid. p. 886.)

much clear gain to us, in the capital thus brought into the country by the rich peasants and others, who sell their real property here, and emigrate in great numbers to the United States."[1] The *droit d'aubaine* is equally oppressive, subjecting to a like duty all property, which emigrants to the United States might derive, on the death of relatives in the country of their origin; and the duty imposed in such cases is also, in general, ten per cent. on the capital.

The local law of most of the States of the American Union, being based on the feudal principles of the English common law, is less favorable to foreigners becoming land-owners than that of France, and other countries of the continent of Europe, where aliens are permitted to hold real estate, and to take, *ab intestato* and by will, as native subjects.[2] The treaties referred to only provide, like the previous one with Prussia, that when land, within the territory of one of the parties, would descend to a citizen or subject of the other, were he not disqualified by alienage, he shall have two years, at least, (which is substituted for the indefinite term, *reasonable time*, in the treaty with Prussia,) in which to dispose of it; and, in the treaty with Saxony, this provision is made to apply to those who take by devise, as well as by descent. The general power, however, of disposing of property by will, donation, or otherwise, by the citizens or subjects of the one country, in favor of those of the other, is confined to personal property; and when, in the treaty with Bavaria, it was attempted to apply it also to "real estate," the Senate refused their ratification, unless these words were stricken out.[3]

In the despatch from which we have already quoted, the impolicy of preventing aliens from purchasing real estate is discussed, and its effect, in withholding investments of German

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[1] Mr. Wheaton to the Secretary of State, May 14, 1845.

[2] See Part II. c. 2, § 4, p. 118.

[3] This will explain the words in a parenthesis, on the face of the original treaty; and they are printed in the same way in the United States Statutes at Large, vol. ix. p. 827.

capital, shown; but this subject has been generally regarded in the United States as a matter for State legislation. Indeed, it is not always easy to reconcile the exclusive authority of the federal government, through the treaty-making power, to enter into agreements with foreign States, in cases in which the concurrence of the latter is essential, with the control reserved by the States over all affairs of internal or municipal cognizance. And when, in the Treaty of the 30th of April, 1853, with France, it was proposed to remove the disability on French subjects holding land, the stipulation, on the part of the United States, (probably on account of a doubt of the authority of the general government to go further,) only extended to an engagement that the President would recommend to the several States to pass the laws necessary to secure a reciprocity.[1]

Another important subject for international regulation is the extradition to foreign States of fugitives from justice. Though the Chief Justice, with whom three of the other Judges concurred, declared, in 1840, that "the exercise of this power by

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[1] Treaties of the United States, 1853–4, p. 114. The Treaty of 1778, with France, repealed, in favor of the United States, the *droit d'aubaine*, and *droit de détraction;* and it gave a reciprocal right to the citizens and subjects of either of the respective countries to dispose, by testament, donation, or otherwise, of immovable as well as movable property, in the country of the other, and that their heirs might succeed *ab intestato*, without naturalization. The Treaty of 1794, with England, provided that alienage should not affect British subjects who held land in the United States, or American citizens who held land in Great Britain, and that they might hold, grant, sell, or devise the same, as if they were natives, and that neither they nor their heirs should be regarded, as to such land, as aliens. The Convention of 1800, between the United States and France, also provided for the liberty of disposing, by the citizens of either country, of their property, immovable as well as movable, in the other, in favor of such persons as they should think proper, by testament, donation, or otherwise, and that they should succeed without naturalization and be exempt from any duty; but this was not to derogate from any laws of either State against emigration; and in case the laws of either country should restrain strangers from the exercise of the rights of property, as to real estate, it is further provided that such real estate may be sold, or otherwise disposed of, to citizens of the country where it may be. All these treaties have expired. U. S. Statutes at Large, vol. viii. pp. 18, 122, 182. See, also, Wheat. Rep. vol. i. p. 359. Martin *v.* Hunter. Ibid. vol. ii. p. 259. Chirac *v.* Chirac.

the States is totally contrary to the power granted to the United States, and repugnant to the Federal Constitution," the question was left, by the decision of the Supreme Court, an open one.[1] There was, at that time, no subsisting conventional arrangement on the subject, the only previous provision of the kind having been contained in the Treaty of 1794, with England, which expired long before the last war. The present stipulation with Great Britain on that subject, arose from the Treaty of the 9th of August, 1842; and the Extradition Treaty with France was concluded on the 9th of November, 1843.

A convention for the same object was made with Prussia, on her own behalf and that of several other German States, on the 29th of April, 1845; but it differed from the preceding ones, in that each power excepted the extradition of its own subjects. The preliminary note from Baron Bulow, on which the negotiations were opened, had contained the two following conditions: — 1°. Qu' aucune des parties contractantes ne sera tenue à livrer *ses propres sujets*. Une pareille extradition à des tribunaux étrangers serait apparemment aussi peu compatible avec la législation des États Unis qu' avec celle de la Prusse et des autres États Allemands; 2°. Que quand un criminel fugitif a commis un nouveau crime dans l'État, où il s'est rendu, son extradition ne pourra avoir lieu que lorsque l'information, pour ce nouveau crime, sera terminée et que le condamné aura subi sa peine.[2]

The instructions under which it was negotiated were given by Mr. Calhoun, but, before it was received in this country, the administration was changed, and Mr. Buchanan had become Secretary of State. President Polk, in submitting it to the Senate, called their attention to the difference in question; and it is presumed that it was on that ground that the treaty was not ratified.[3] The fact was probably not adverted to, that

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[1] Peters's Rep. vol. xiv. p. 540. Holmes *v.* Jennison.

[2] Baron Bulow to Mr. Wheaton, February 17, 1844.

[3] President Polk's Message to the Senate, December 15, 1845.

the proposed exception, which was a *sine qua non* with Prussia, grew out of the difference between the systems of criminal jurisdiction, which prevail on the continent of Europe and in England and the United States. It is not necessary, in most European States, that the offence should be committed within the jurisdiction of the country, in which the accused is tried, but he is justiciable by his sovereign, wherever the crime occurred. The treaty of extradition between Russia and Prussia, concluded in 1844, and which was transmitted by Mr. Wheaton to the Department of State, fully explains this view. It provides that, "if the accused is a subject of the sovereign of that country where he has sought refuge, after having committed a criminal offence in the country of the other sovereign, he shall not be delivered up, but the sovereign of whom he is a subject shall cause justice to be promptly and strictly administered against him, according to the laws of the country. But if any individual whatever has been arrested in the country where he has committed a criminal offence, or any misconduct whatever, (*excès quelconque*,) the sovereign of the country where the arrest takes place shall cause justice to be administered against him, and the punishment he incurred to be inflicted upon him, even if such individual be a subject of the other sovereign."[1]

The treaty with Prussia and her associated States, which had been rejected when made by Mr. Wheaton, was negotiated anew by Mr. Webster and Baron Gerolt, at Washington, in 1852,[2] and to it several States, not included originally therein, have become parties, namely: Bremen, Mecklenburg-Strelitz, Wurtemberg, Mecklenburg-Schwerin, Oldenburg, and Schaumburg-Lippe.[3] And while this work has been passing through the press, a treaty concluded on the 12th of September, 1853, between the American and Bavarian ministers at London, Mr. Buchanan and Baron de Cetto, to the like effect, has been pro-

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[1] Mr. Wheaton to Mr. Calhoun, July 17, 1844.

[2] See Part II. ch. 2, § 13, note *a*, p. 180.

[3] See U. S. Treaties, 1853-4, p. 104.

mulgated. It contains the same provision with the Prussian treaty, that none of the contracting parties shall be bound to deliver up its own citizens or subjects, for which it recites, in common with the other treaty, a constitutional objection on the part of the German powers; and it applies to the same crimes as that treaty does.[1]

Among other subjects which were intrusted to Mr. Wheaton, was that of procuring the assent of the Prussian government to act in the arbitration, provided for under the Convention of April 11, 1839, between the United States and Mexico, for the adjustment of American claims against the latter Republic. He was successful in inducing the acceptance of the office, which had been at first declined, and to his suggestion was the choice of Baron Von Roenne mainly owing.[2] He, however, failed, in the application which he made, by direction of his government to that of Prussia, to obtain the contributions to the science of public law, which the promulgation of the opinions, on which the judgments of the arbiter were based, would have afforded.

A matter not arising in the Prussian dominions, in which the interposition of Mr. Wheaton was asked, was that of the arrest, by the Hanoverian authorities, of the officers of an American merchant ship, charged with the commission of a homicide within their waters. Without raising the question, as to the amenability to a State of the persons on board of a merchant vessel, which comes voluntarily within its jurisdiction,[3] he asked on the grounds of national courtesy, inasmuch as the offence charged grew out of the maintenance of the ship's discipline, as it in nowise injured any Hanoverian subject, or affected the tranquillity and good order of the country, and that the parties were amenable to the tribunals of their own country, that the accused might be delivered to the consul, to be sent home to

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[1] Washington Union.

[2] Mr. Wheaton to the Secretary of State, July 17, 1839.

[3] See Part II. c. 2, § 9, p. 154.

the United States.[1] The request thus made was complied with, on the payment of the costs of the criminal proceedings, to the time of the extradition.

He had, also, occasion to consider the effect of the return of a naturalized American citizen to the country of his original allegiance, and to refuse him his interposition, on the ground, that, so long as he remained in the country of his birth, his native domicile and national character reverted, and that he was bound, in all respects, to obey the laws, as if he had never emigrated.[2]

The subject of the Sound duties at Elsinore, the examination of which was commenced at Copenhagen, was continued at Berlin. In one of his later despatches he says: — "The most recent project brought forward has in view the redemption of the duties by the other three maritime powers of the Baltic — Russia, Sweden, and Prussia; who might afterwards collect in their ports an amount of tonnage duties, or duties on the importation or exportation of merchandise, equal to the interest of the capital advanced by them for this purpose, and thus the inconvenience, delay, and expense of collecting the duties at Elsinore, might be avoided.[3] But, in a subsequent communication, he announced a new treaty between Prussia and Denmark, regulating the payment of these duties by the former power till 1851, when, he added, "the Convention of 1841, between Great Britain, Sweden, and Denmark, for regulating the tariff of the Sound duties, will expire, and the whole matter will necessarily become subject to revision between Denmark and all other powers interested in the question."[4] To the influence of the Emperor Nicholas, who was actuated therein by political and not commercial considerations, Mr. Wheaton ascribes the con-

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1 Mr. Wheaton to Baron Stralenheim, May 30, 1842.

2 Part II. c. 2, § 6, p. 138, note *a*. See also for the Naturalization Laws of different countries — Appendix.

3 Mr. Wheaton to the Secretary of State, June 30, 1844.

4 The Same to the Same, January 21, 1846.

tinuance of these tolls. His object seems to have been, through the essential support which he afforded to Denmark, for the maintenance of these claims against her neighbors, to secure a protectorate over that power, which held to him on the side of the Baltic the same relation that Turkey did on that of the Black Sea.[1]

An analogous subject, which likewise received Mr. Wheaton's continued attention, was the duties levied by the Hanoverian government at Stade, on the goods of all nations passing up the Elbe, except those belonging to citizens of Hamburgh, and the origin of which, as founded on a title going back to an original grant from the Emperor Conrad, in 1038, is historically traced. These duties were not abolished by the Congress of Vienna, or included in the provisions in relation to the rivers of Germany, because they were considered sea, and not river, tolls. Their importance may be judged of by the fact, that even in 1834, 1835, and 1836, one hundred and forty-five American vessels passing up the Elbe paid, on the cargoes of each, about seven hundred marks banco; and that, in 1840, there were imported into Germany, through the port of Bremen, staple productions of the United States, to the amount of fifteen millions of marks banco, besides an increased amount of colonial produce.[2]

The attention of the American government having been attracted to this subject, in its bearing on the commerce of the United States, by the various communications of Mr. Wheaton, a provision placing American vessels on the same footing with Hanoverian was inserted in the Treaty of 1846.[3]

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[1] Mr. Wheaton to the Secretary of State, Feb. 15, 1845. See Part II. c. 4, § 9, p. 242.

[2] Mr. Wheaton to the Secretary of State, September 8, 1841; February 25, 1843.

[3] See supra, p. xcvii., note; also Part IV. ch. 4, § 9, p. 244, note *a*. In connection with the Sound dues, and the sea tolls levied at Stade, may be noticed the great inequality which exists, with regard to coast lights, under the respective systems adopted in the United States and Great Britain, and of which the former have complained. Mr. Abbott Lawrence, Minister at London, says, in a note to Viscount Palmerston, December 31, 1850: — "The light-houses, floating lights,

Nor was the attention of the Minister at Berlin limited to matters which affected the interests of the United States in Prussia, or even in Germany. It will hereafter be amply shown

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buoys, and beacons, on the whole sea and lake coast and rivers of the United States, were constructed and are maintained by the Federal Government; an annual appropriation being made by Congress for these objects. In the year 1848, there were 270 light-houses, 30 floating lights, 1,000 buoys, besides fixed beacons. There are, probably, at this time, including those under construction on the Pacific coast, more than 300 light-houses, with a proportionate number of floating lights and buoys, all of which are given to the use of the world by the United States, without tax or charge. Within the ten years last past, the shipping of the United States has contributed, upon 7,872 vessels, the aggregate tonnage of which was 4,681,925 tons, the enormous sum of £234,000, or over $1,100,000, for the support of the light-house system of the United Kingdom. During the last year, there appears to have been levied on the shipping of the world, for the light dues in the United Kingdom, between £500,000 and £600,000. Of this, one fourteenth was paid by citizens of the United States, while British subjects, with a fleet equally large in the ports of the United States, have not been taxed at all for the maintenance of lights."

These facts were not denied by Lord Palmerston, who, in his answer to Mr. Lawrence, dated February 6, 1851, says: — "The British government has not the power to deal with this matter as it pleases. The various lights, which are established around the coast of the United Kingdom, have been erected and are maintained by various corporate bodies, and these corporate bodies are entitled, by patents and acts of parliament, to levy certain dues upon shipping, in order to raise the necessary income for paying interest on the capital laid out in the construction of the lights, and for providing the means requisite for defraying the expense of maintaining these lights. Her Majesty's government have no right or power to order these corporate bodies to abstain from levying these dues, and these dues could not be made to cease, unless the parliament were to vote such sums as would be necessary to buy up for the public the interest which the private parties concerned have in these lights; nor unless parliament were, at the same time, to authorize the government to abolish light dues for the future, and were to charge upon the public revenue the expense of maintaining these lights." He denies, however, that these dues are an infraction of any conventional stipulation. "It is no part of the engagements of the Treaty of 1815, that the internal system and local arrangements of the two countries, upon commercial matters, should be the same. But the principle distinctly laid down in the second paragraph of the 1st article of the Treaty of 1815 is, that the vessels of each country shall, in the ports of the other, be treated, in regard to duties and charges, in the same manner and on the same footing, as national vessels; and this stipulation is strictly observed, in regard to the light dues which are levied upon American vessels in British ports; for no other or higher duties are levied in those ports upon American vessels than are levied in those ports on vessels belonging to the United Kingdom." Parliamentary Papers, vol. lvii. No. 85, p. 1.

that he lost no opportunity of creating a sound public opinion in Europe, respecting the political course of the United States. He thus alludes to a conversation which he had with the king, Frederick William III., at one of the royal entertainments: — "His Majesty expressed the warmest wishes for the prosperity of our Republic, and his satisfaction at the measures taken by the President to preserve our neutrality, in respect to the troubles of Canada, which in their consequences might affect our interests. I ventured to assure his Majesty that in no possible event would the United States swerve from their fixed principles of non-interference in the internal affairs of their neighbors, so long as their own national rights and interests were not injuriously affected."[1]

Mr. Wheaton had also been enabled, through the confidence reposed in him by the Baron de Werther, the Minister of Foreign Affairs, who read to him a despatch from the Prussian Minister in London, to communicate to his government the real sentiments entertained in England, and expressed to the Ministers of other powers, as to our good faith with respect to Canadian affairs.[2]

One of Mr. Wheaton's last official acts was to communicate to the government of Prussia the circumstances which led to the declaration of war against Mexico and the blockade instituted in consequence thereof. "He stated that the blockade intended to be established would not give any just ground of complaint to neutral powers, since it would not be what is called 'a paper blockade,' but would be carried into effect by an actual investment of the ports in question by adequate naval forces. That we professed the same principles, in respect to neutral rights, which had been professed and maintained by Prussia, ever since the reign of Frederick the Great, and should be anxious to preserve our consistency in that respect, by meting out

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[1] Mr. Wheaton to the Secretary of State, January 31, 1838.

[2] Same to Same, March 23, 1838.

to others the same measure of international justice as belligerents, which we claimed from them when neutrals."[1] Annexed to the despatch, which reported his proceedings in this matter, were extracts from Reddie's "Researches on Maritime International Law," and from the "Régles Internationales et Diplomatie de la Mer," by Ortolan,—works to which repeated reference has been made in these remarks and in our notes, and which were the latest English and French authorities on these points of maritime law.[1]

A matter deeply interesting to the American people, on which Mr. Wheaton's talents were exercised, grew out of a negotiation to which Prussia was a party, though the United States were not. And he had the satisfaction of communicating to the Secretary of State the assurances of Baron Bulow, that whatever might have been the views of England, it was never intended by the other contracting parties, to the Quintuple treaty of 1841, for the suppression of the slave-trade, that it should be executed in any other manner than by searching each other's ships; and that for its application to those of other nations, the British government were alone responsible. The Minister for Foreign Affairs, moreover, expressed his conviction of the difficulty, if not impossibility, of the American government adhering to the principle, which formed the basis of the treaty between the five European powers.[2] Mr. Wheaton was also informed by him, pending the discussions in the French Chamber of Deputies, in a conversation respecting the ukase of the 26th March, (7th April) 1842, for carrying it into effect, that it was not the intention of the Prussian government to adopt, at that time, any similar measure, or to publish the treaty as a public law of the kingdom, as they did not consider it existing, so far as France was concerned, until ratified by that power.[3]

It may not be irrelevant here to state that assurances were

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[1] Mr. Wheaton to the Secretary of State, May 27, 1846.

[2] The Same to the Same, May 18, 1842.

[3] The Same to the Same, June 18, 1842.

given to the same effect, by M. Guizot to General Cass, as to the views of the French government of its bearing on other nations, in the event of the ratification of the treaty by France. In his letter of 26th May, 1842, to the American Minister at Paris, M. Guizot says: "Il ne m'appartient pas de discuter la valeur des inductions que vous tirez, par rapport aux vues particulières du cabinet de Londres, de certains passages des dépêches écrites par Lord Palmerston et par Lord Aberdeen à Mr. Stevenson; mais je n'hésiterai pas à dire quelle est la pensée du gouvernement du roi sur la grave question que vous soulevez. Le traité du 20 Decembre, 1841, quelles que puissent être à l'avenir ses destinées, n'est pas fondé sur un autre principe que les Conventions de 1831 et 1833. Les stipulations de ces conventions n'engageaient que la France et l'Angleterre: le traité du 20 Decembre les étend à l'Autriche, à la Prusse et à la Russie, en y apportant quelques changemens plus ou moins graves, mais qui n'en altérent pas la nature. Pour qu'on pût en faire découler l'intention, fort extraordinaire, d'imposer aux autres états l'obligation de s'y soumettre, il faudrait que cette intention, que n'indique en aucune façon l'acte du 20 Decembre, résultât des conventions antérieures. Jamais nous ne les avons entendues, jamais nous n'avons pu les entendre ainsi."

In directing the public mind of Europe on this subject, Mr. Wheaton was particularly happy. To his "Inquiry into the Validity of the British Claim to a Right of Visitation and Search of American Vessels, suspected to be engaged in the African Slave-Trade," and to the Essay of General Cass, with his letter to M. Guizot, in the nature of a protest against the Quintuple Alliance, the answer to which has been noticed, may, in a great degree, be ascribed the refusal of France to ratify that treaty. How able a coadjutor in the defence of the maritime rights of nations, he was regarded by his eminent colleague at Paris, may be inferred from the following note of General Cass, acknowledging the receipt of Mr. Wheaton's Essay: "I have read your work on the right of search with the greatest pleasure, and I

may add, with much profit. I thought I knew the whole history of this question, but I find that I had deceived myself, and that I had much to learn, which I have now learned.

"Your historical narrative is most satisfactory, and you put the *argumentum ad homines* to our friends the English, on the existence of slavery in the United States, with equal good temper and good sense. How they will get out of the dilemma in which you have placed them as the authors of the evil, I do not see.

"Your general deductions are not less convincing; and I think you may safely consider the pretension to search our ships, in time of peace, as a question of right, forever disposed of. I am glad to see you make so good a case of a decision of the Supreme Court.

"On the whole, I congratulate you upon the success of your labors. They will do our country good everywhere, and cannot fail to be useful to yourself, and increase the literary reputation you have already so justly acquired."

The publication which has been referred to received, as it were, an official sanction from Mr. Legaré, on his assuming the seals of the State Department. In his earliest instructions he said: "I avail myself of the first opportunity afforded by our new official relations, to express to you my hearty satisfaction at the part you took, with General Cass, in the discussion of 'the Right of Search,' and the manner you acquitted yourself of it. I read your pamphlet with entire assent. From the first moment that I was made acquainted with the provisions of the Quintuple Treaty, as they were interpreted by English journalists, and would, there is too much reason to be feared, have been executed by English naval officers, I was deeply impressed with the vital importance of the occasion. The law of nations, like all other laws, shifts with the current of popular opinion and feeling; and in it, as in all other laws, the maxim of wisdom is *obsta principiis*. England, as you know, has over and over again attempted to interpolate, and, so far as the practice of her

prize courts could effect it, has actually interpolated new principles into that body of jurisprudence, not only without the assent, but against the unanimous protest of other powers. The rule of '56 — the blockade of coasts — the confiscation of vessels, *bonâ fide* destined, in the hope of a free entry, for ports not under blockade at the time of their departure — the granting salvage for neutral vessels taken out of the hands of French captors, even when there was no possible ground of condemnation against them,—these are examples of the spirit of innovation which she has manifested. Were she any other power than one armed with little less than a maritime despotism, such encroachments would not excite a very anxious jealousy. But in contemplation of any possible resistance to the practical abuses, which would inevitably flow from the admission in theory of her pretensions to a legal right, *as such*, in this particular, it is absolutely essential to subject those pretensions to a searching and thorough scrutiny, so as to demonstrate to the conviction of all unprejudiced minds that there is no choice but resistance. I have no idea that war ever ought to be undertaken in a popular government, constituted as this is, unless the great body of the people be fully satisfied that their cause is just, and their wrongs worth the cost of adjusting them by force. It is, at the same time, due to the civilization of the age, and the power of opinion, even over the most arbitrary governments, that every encroachment on the rights of nations should become the subject of immediate censure and denunciation. One great object of permanent missions is to establish a censorship of this kind, and to render by means of it the appeals of the injured to the sympathies of mankind, through diplomatic organs, at once more easy, more direct, and more effective."[1]

It was in acknowledging the foregoing despatch, that, after referring to the discussions, growing out of the construction of the Ashburton Treaty, Mr. Wheaton thus proceeds: —

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[1] Mr. Legaré to Mr. Wheaton, June 9, 1843.

"The right claimed (by the English) comes to this—a right to seize and send in for adjudication, before the court of the captor's country, subject to the payment of costs and damages, in case of seizure without reasonable cause.

"I do not know what Lord Aberdeen and Sir Robert Peel's admiralty lawyers may have told them; but I defy them to show a single passage of any institutional writer on public law, or the judgment of any court by which that law is administered, either in Europe or America, which will justify the exercise of such a right on the high seas in time of peace."

And he shows that the British claim is not to be confounded with the case of the seizure of vessels hovering on the coast, to violate the revenue laws of a country:—"The distinction now set up, between a right of *visitation* and a right of *search*, is nowhere alluded to by any public jurist, as being founded on the law of nations. The technical term of 'visitation and search,' used by the English civilians, is exactly synonymous with the *droit de visite* of the continental civilians. The right of seizure for a breach of the revenue laws, or laws of trade and navigation, of a particular nation, is quite different. The utmost length, to which the exercise of this right on the high seas has ever been carried, in respect to the vessels of another nation, has been to justify seizing them within the territorial jurisdiction of the State against whose laws they offend, *and* pursuing them, in case of flight, beyond that limit, seizing them upon the ocean, and bringing them in for adjudication before the tribunals of that State. 'This, however,' says the Supreme Court of the United States, in the case of The Mariana Flora, 'has never been supposed to draw after it any right of visitation or search. The party, in such case, seizes at his peril. If he establishes the forfeiture, he is justified.'

"The treaties between Great Britain and several other European powers have not only stipulated for the mutual exercise of the right of search, but have provided that the vessels seized should be carried, not into the ports of the capturing power, but

before the courts of that country under whose flag the captured vessel is sailing. But the Treaty of Washington contains no such provision; and if we were to yield in practice to the British pretension, we should be in a worse situation than if we had actually acceded to the Quintuple Treaty of 1841."[1]

Another discussion, in which Mr. Wheaton was engaged, which excited great interest among the members of the diplomatic corps throughout Europe, and likewise obtained the sanction of Mr. Legaré, involved the immunities of foreign ministers, and their exemption from local jurisdiction. It will be found inserted, at large, in the body of the work.[2]

Among others of what may be deemed Mr. Wheaton's semi-official labors, were two papers, which he published in 1842, in the Revue Etrangère et Françoise, at Paris. The one related to the violation of American territory, during the civil war or insurrection in Canada in 1837, during which the steamer Caroline was burnt and one of her crew killed, at Schlosser, in the State of New York, and to the subsequent arrest of a person,

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[1] Mr. Wheaton to the Secretary of State, July 6, 1843. Mr. Wheaton, in a private letter to Jared Sparks, dated Berlin, May 8, 1843, said: —

"You ask why the three northern powers should have acceded to the treaty of December, 1841? I answer, that having already detached Great Britain from her close connection with France by the treaty of July 15, 1840, they still wished to preserve the general harmony of the great European alliance, and therefore were very willing to do whatever might be agreeable to the British government, and was not, at that time, supposed to be disagreeable to the French nation, in a matter in which the northern powers take no interest, but which might gain them some credit with the purblind philanthropists, whilst it could be of no possible injury to their navigation and commerce. They have little or none in the African, West Indian, and South American seas, and have besides taken very good care in the treaty itself to exempt from its operation the Mediterranean and all those parts of the ocean frequented by their merchant vessels. As to the danger of creating a precedent for the right of search, as claimed by Great Britain in time of war, they excuse themselves on the ground that an exceptional right of search, expressly created by treaty, and confined to a specific object, rather confirms the general freedom of navigation than otherwise — *exceptio probat regulam.*" See further, Part II., c. 2, § 15, note *a*, p. 187, and Rev. Étr. et Fr. tom. ix. p. 595.

[2] Part III. c. 1, § 17, p. 287; and, for a review by Fœlix, see Rev. Étr. et Fr. tom. ii. p. 31.

named McLeod, accused of having been engaged in the enterprise. The courts of New York refused to discharge him, though the British government admitted the act to have been committed by its authority, the judges holding that a subject of Great Britain, who, under directions from the local authorities of Canada, commits homicide in the State of New York, may be prosecuted in its courts as a murderer, even though his sovereign subsequently approves his conduct, by avowing the directions under which he did it, as a lawful act of government.[1]

This case involved two very grave points; the one—the right, on the part of the British authorities, to go into American territory, and to take possession, by force, of a vessel belonging to a citizen of the United States—the other, the right of the tribunals of the country to try, as an offence against its criminal jurisdiction, an act committed under the authority of a foreign government.

Though the latter point had been practically settled by the verdict of acquittal, Mr. Wheaton took occasion to present it to the publicists of Europe, in connection with our complex system, which prevented the federal government, which alone conducts our foreign relations, from interfering effectually and promptly with the proceedings of the State judiciary. In this case, however, the difficulty did not arise from any defect in the organic law, which extends the power of the federal judiciary to such cases, but from an omission in the Judiciary Act of 1789, which was subsequently supplied by the Act of the 29th of August, 1842.[2] As the law at the time stood, the case would have been brought to the Supreme Court of the United States, but only after a final decision of the highest court of the State, had McLeod been willing, instead of going to trial, on the question of fact, to have submitted to a succession of appeals. In the event of an unfavorable verdict on his trial, he might have obtained an arrest of

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[1] The People *v.* McLeod, Hill's Rep. vol. 1, p. 377; S. C. Wend. Rep. vol. xxv. p. 483.

[2] U. S. Statutes at Large, vol. v. p. 539.

judgment from the court on the question of international law involved; and had the courts of New York decided against him, he might have taken an appeal to the Supreme Court of the United States, and, according to the true principles of public law, it could only have been, on the failure of the central government to interfere, after the decision in the last resort, that the English government could have had recourse to reprisals. This is according to the opinion given by Lord Mansfield, when Solicitor-General, and the other law officers of the Crown, in the celebrated case of the Silesian loan.[1] In the various demands

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[1] It could scarcely have been supposed, considering the sanction given by the British government to the opinion referred to in the text, that it would have been contended in England that the final decree of an admiralty court was conclusive as against the claimants under a convention for indemnity; yet this point was raised by their Commissioners under the treaty of 1794, and in a way that, had it been successful, would have rendered the whole treaty a nullity. The British Commissioners inquired, "What are the cases which are to be entertained and examined by this board? The treaty requires that the complainant shall state that he has suffered loss or damage, for which he cannot obtain just and adequate compensation in the course of judicial proceedings. The last step of regular judicial proceeding in England is the ultimate decision of the High Court of Appeals, that is to say, of the King in Council. Does any one suppose that this Board has power to examine, revise, and reverse the decisions of this supreme tribunal?" asked the British members of the board. "Certainly," replied the American members; "if it should appear to us, that in any case the High Court of Appeals had decided, rather in conformity with the laws and usages of England, than in consonance with the law of nations, and the principles of equity and justice, it will become our duty, as it is clearly within our power, to examine the case, and to make such decision as shall be in conformity with the law of nations, and the principles of justice and equity. If this be not the true construction of our powers, it does appear to us that this article of the treaty is little better than a nullity." The fifth commissioner, who by the treaty was chosen by lot, which had resulted in the selection of an American, proposed to take the opinion of the Lord Chancellor (Loughborough). Col. Trumbull, who thus occupied the place of arbiter, tells us that the Chancellor answered immediately and frankly: —

"The construction of the American gentlemen is correct. It was the intention of the high contracting parties to the treaty to clothe this commission with power paramount to all the maritime courts of both nations — a power to review, and (if in their opinion it should appear just) to reverse the decisions of any or of all of the maritime courts of both. Gentlemen, you are invested with august and solemn authority. I trust that you will use it wisely." Trumbull's Reminiscences of his own Times, p. 193.

that our government has made for indemnity, it has ever been distinctly admitted that it was only after a condemnation by the highest court, or where the uniform course of proceeding was such as to make a condemnation morally certain, that the government of the United States was justified in making reclamations, on account of their citizens, for illegal seizures. Mr. Wheaton remarks that in all free countries governed by representative constitutions, the courts are independent of the immediate action of the executive power, though, in England, where the prosecution may be terminated *in limine* by the intervention of the Crown, authorizing the Attorney-General to enter a *nolle prosequi*, the responsibility of the government would commence on its refusal to arrest a proceeding against a foreign subject, of which the government of the latter had just reason to complain.

As to the other point — the United States could not admit that, though The Caroline might have been a piratical vessel, the whole American nation had become pirates. On the contrary, it was maintained that the United States had, as far as possible, fulfilled their duties as a neutral State, which, we have seen, the British government itself admitted, in its communications with other foreign powers; and it was shown that all that England could contend for, in her contest with the insurgents of Canada, was to have the rights that a sovereign may exercise towards his subjects who had rebelled, and those which are allowed to a belligerent, in time of war, with reference to neutral States. It is an incontestible principle that no act of hostility can be exercised by belligerents within the limits of neutral territories. Nor did the case fall within the very doubtful exception, suggested by Bynkershoek, of an attack commenced out of the territory, and continued, *dum fervet opus*, within it, and which, even in such a case, according to the publicists, was always subject to the condition that any injury that might accrue from it, either to person or property, was to be regarded as an act of aggression. The conditions here annexed

to the exercise of the right are scarcely compatible with its existence, but in the case of The Caroline the contingency did not arise. It was not the continuation of a pursuit into an enemy's territory, but a premeditated attack of the military authorities of the Province of Upper Canada, executed during the night, against an American vessel at anchor in a harbor of the United States, on the shores of the Niagara Strait, which separates the respective territories of the two countries. All the writers on public law, especially the English, agree in forbidding such an act of hostility within neutral territory, even against an enemy.[1]

The subject of the other article, which, as well as the case of The Caroline, was discussed between Mr. Webster and Lord Ashburton, was the affair of The Creole. The facts were these. An American planter sailed from Richmond, Virginia, on board of this vessel, with 135 slaves belonging to him, whom he was carrying to New Orleans. In the straits, between Florida and the Bahama Islands, the negroes revolted, killed their master, put the captain in irons, and wounded several of the crew, and then took possession of the vessel and carried her into Nassau. The governor arrested nineteen of the slaves concerned in the revolt and assassination, and set the others at liberty. As to the prisoners, he asked the direction of his government.

The case arose before the extradition treaty with Great Britain, but subsequent to the abolition of slavery in the West Indies. The inquiry is preceded by an exposition of the law of nations, in reference to extradition, substantially the same as is given in the "Elements," which work was, indeed, quoted in this very matter, by Lord Campbell, during a debate in the House of Lords, in which he, as well as Lord Brougham, Lord Denman, and Lord Lyndhurst, took part. Mr. Wheaton then remarks that slavery has existed, as a fact, among the most

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[1] De la question de juridiction qui s'est presentée devant les cours des Etats-Unis dans l'affaire de Macleod, par M. Henri Wheaton, Ministre des Etats-Unis, à Berlin. Rev. Etr. et Franç., tom. ix. p. 81.

civilized nations; and that though the slave-trade has been abolished by all the powers of Europe and America, its fruits still remain in the United States, Brazils, and the Spanish colonies, the British emancipation act never having been followed in those countries. The independence of every nation in this matter must be respected; and it was to attribute an immense and unheard of power to the legislation of a single nation, to accord to it the right of changing the laws which control the property of all nations. Until Sommersett's case, in 1771, slavery was recognized in England, and slaves were publicly sold at the Exchange. Even so late as 1827, Lord Stowell decided that, though slaves arriving in England were free while they remained there, and their masters could not send them out of the country, yet if they returned to the colonies, no matter by what means, their ancient condition was restored.[1] The laws of France formerly preserved, to a greater or less extent, the control of the master over the slaves brought with him from the colonies; but since 1791, the slave who voluntarily seeks an asylum in France, under ordinary circumstances, may claim the protection of the maxim which frees whomever touches the soil; but the French ports cannot become a refuge for robbers, to find succor and impunity for crimes committed against the persons and property of a friendly nation.

Mr. Wheaton shows that, though in the Netherlands, in the middle ages, foreign slaves were free on touching the soil, a distinction was made in favor of masters arriving from the colonies, accompanied by their slaves. In Denmark, a slave from the colonies may be reclaimed by his master. In Prussia, masters travelling with their slaves preserve their rights over them; and in Russia, and other countries where slavery still exists, extradition by the authorities of the country to which the serf escapes prevails; while in Spain and Portugal, masters bringing their slaves from the colonies preserve their property in them. Hence

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[1] Hagg. Admiralty Rep. vol. ii. p. 96. The Slave Grace.

he concludes that the nations of Europe have not established it, as an invariable rule, having the force of a moral law, that an individual, a slave in the country from whence he departs, becomes free when he touches European soil; and if they had, it would not follow that it applied to the case of The Creole.

The only remaining question was, whether the particular circumstances, connected with the arrival of The Creole in the port of Nassau, constituted such an exception to the general rule as to authorize the American government to ask any satisfaction of the English government.

Mr. Wheaton regards the affair of The Creole neither as a case of the extradition of the offenders by the government of the country, where they have committed a crime, nor as the ordinary one of slaves seeking an asylum in a country where slavery is not tolerated. The general principle is undoubted, that the vessels of a country, on the ocean, and beyond the territorial limits of any other nation, are subject to its exclusive jurisdiction, and that they only pass under the jurisdiction of a foreign State when they voluntarily enter its ports. The Creole never ceased to be subject exclusively to American jurisdiction. Entering into a friendly port, against the will of the owner and captain, and in consequence of a crime on the high seas, cognizable only by the courts of the United States, The Creole continued to enjoy the rights of her flag, and the captain had a claim for the assistance of the local authorities to regain possession of his vessel. The negroes could not be said to have arrived in English territory; they could not be considered as mixed with the inhabitants; and whatever the generality of its expression, the law could not be taken to be applicable to slaves arriving in the country in consequence of crime, and against the will of their owners.[1]

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[1] Examen des questions de juridiction qui se sont elevées entre les gouvernements Anglois et Américain dans l'affaire de la Créole. Rev. Etr. et. Fr., tom. ix. p. 345.

It may not be irrelevant to state that, by the decision of umpire, a full indemnity was accorded for the value of the slaves on board of The Creole, by the joint commission, under the convention of February 8, 1853, between the United States and Great Britain, for the settlement of claims against either government, by the citizens or subjects of the other, arising subsequent to the treaty of Ghent. The principles contended for by the American government, and discussed in the preceding argument of Mr. Wheaton, were thereby recognized and sustained. Similar adjudications were also rendered in several other cases.[1]

Of an analogous character with the preceding papers was an article published by Mr. Wheaton on the Constitution of the United States, in the Staats-Zeitung, the official gazette of Prussia, on the 27th of March, 1843. The object of it was, to show the distinction between the debts of the individual States and that of the Union. It appeared at a time when the repudiation of their obligations by some of the States was materially affecting the American reputation abroad; and the occasion was taken to point out the fact, that neither the general government nor the other members of the Confederacy were in any wise connected with the transactions, which were the subject of complaint. While he shows that "the American federal government has always fulfilled, with the most conscientious fidelity, its engagements towards its foreign as well as its domestic creditors," he denies that the suspension of the regular payment of interest on their public debt, by some of the States, where it concerns foreign creditors, contains within itself a *casus belli*, on the part of those powers whose subjects suffer from it; and he refers to the fact, that the federal government had not the constitutional power to compel the States to comply with these obligations. As to its being, in any case, a *casus belli*, he remarks:

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[1] New York Evening Post, January, 1855. Letter dated London, January 12, 1855.

"This deduction proceeds from the supposition, that where a sovereign State fails to fulfil its agreement with the subjects of a foreign State, it becomes a ground of reprisals on the part of the latter. Such a supposition is nowhere supported by the publicists, and this idea has always been set aside by the British government, in the different claims which it has made in favor of British creditors in Spain, Portugal, and the South American republics." Writing to a friend, about the same period, he says:—"A great deal of my time and attention is occupied in refuting the misrepresentations of our national character and conduct, which are constantly appearing in the German papers, *from no friendly source*, concerning slavery, the slave-trade, State credits, Lynch-law, &c. &c. &c. I hold it to be the duty of a public minister, to take care of the honor of his country abroad."

The revolutions produced in the international policy of China, consequent on the peace of the 26th of August, 1842, with the cession of Hong Kong to England, and the probable opening, through the British treaty, of her ports to the commerce of the world, led, in Germany, to a very thorough examination of the resources of that great empire, including as well its overland trade with Russia, as its relations with the maritime States of Europe and America, and its internal condition under the Mandschu dynasty, which succeeded, in 1644, to the ancient sovereigns of the country.[1] Not only on account of the commerce from Germany, that passed through Russia, but to promote a maritime intercourse by the Cape of Good Hope, Prussia was preparing, in connection with the States of the Zollverein,

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[1] A trade had long been carried on, from the frontier emporium of Kiakta, not only with Russia, but in German manufactures, especially from the Prussian province of Silesia, and the value of the Chinese goods sold at the fair of Nishne-Novgorod, in 1841, amounted to 6,921,473 silver roubles; while the commerce between the two great empires, Mr. Wheaton showed, might be much increased and facilitated by the free navigation of the Amoor, the only great river of Siberia, which, directing its course from east to west, falls into the open sea.

though at her own expense, a mission to China, where an American Plenipotentiary Commissioner had already gone. Mr. Wheaton drew up, in August, 1843, from the materials accessible to him, a paper in relation to the recent military and diplomatic transactions of Great Britain in that quarter, and the measures being adopted in Europe to secure the Chinese trade, and which Mr. Upshur directed to be transcribed and forwarded to Mr. Cushing.[1]

He also prepared about the same time, and transmitted to the Department of State, an argument in support of the claim of the representatives of Commodore Paul Jones, against Denmark, on account of prizes sent into Norway, and delivered up by the Danish government to the English, during our revolutionary war. In this paper, after premising that the case was not included in the Treaty of March 28, 1830, and which was confined, in terms, to claims growing out of the last maritime war of Denmark, he examines the relations which the United States held, during the period in question, towards other governments which had not recognized their independence, and shows that, in the case of a revolution in a sovereign Empire, by a province or colony shaking off the dominion of the mother country, and whilst the civil war continues, if a foreign power does not acknowledge the independence of the new State, and form treaties of amity and commerce with it, though still remaining neutral, as it may do, or join in an alliance with one party against the other, thus rendering that other its enemy, it must, while continuing passive, allow to both the contending parties all the rights, which public war gives to independent sovereigns. That, in 1779, our case was not that of an ordinary revolt in the bosom of a State, but a civil war entitling both parties to the rights of war, was acknowledged by the parent State itself, in the solemn exchange of prisoners by regular cartels, in the respect shown to conventions of capitula-

[1] Mr. Upshur to Mr. Wheaton, November 10, 1843.

tion concluded by British generals, and in the exercise of the other *commercia belli*, usually recognized between civilized States. In the absence of any treaty with England, to exclude the prizes of her enemy, and of any previous prohibition to the United States, by either of which means their prizes might have been refused admission without any violation of neutrality, they had the right to presume the assent of Denmark to send them into her ports; the more especially had they such a right, when based, as in the actual case, on necessity, from stress of weather. When once arrived in the port, the neutral government of Denmark was bound to respect the military right of possession, lawfully acquired through war, by capture on the high seas, and continued in the port to which the prize was brought. He added, that there was no ground for the application of the *jus postliminii*, which could only take place between subjects of the same State or of allies in the war, a neutral State having only a right to interfere to deprive the captor of his possession, when the capture has been made in violation of neutral sovereignty, within the limits of the neutral State, or by a vessel equipped there.[1]

In further accordance with the course, which Mr. Wheaton had adopted, of communicating whatever intelligence he supposed might advance the interests or promote the prosperity of his country, he addressed, at the close of 1845, an elaborate despatch to the Secretary of State, on the importance of reopening the ancient water communication between Europe and the East Indies, by Egypt and the Red Sea and of opening a new route from the United States and Europe to the East Indies, by a ship canal between the Atlantic and Pacific, across the Isthmus connecting North and South America; thus avoiding the immense *détours*, by which the continents of Africa and America are terminated in the southern hemisphere. With the former enterprise he proposed to connect a line of steam-

[1] Mr. Wheaton to the Secretary of State, August 23, 1843. See note on this subject, from Dr. Franklin to Count Bernstoff, December 22, 1779, Sparks's Diplomatic Corr. vol. iii. p. 121.

ers, not only as mail packets, and for passengers, but for the conveyance of the finer fabrics and of valuable merchandise from the United States to the British Channel and German Sea, touching at Cowes or Havre, and proceeding to Bremen or Hamburg, from whence an intercourse was already established towards the East Indies by hydraulic works, parallel with the railroad route between the Adriatic and the German Sea, and forming a continuous communication between the waters falling into the German Ocean and those that emptied into the Black Sea. The obstacles to the navigation of the Danube had been removed, by the Treaty of 1840, between Austria and Russia, the advantages of which were accorded to all nations that had the right to navigate the Black Sea; while the common use of the rivers of Germany had been previously stipulated for by the Treaty of Vienna, of 1815. It may be remarked that the views above expressed, with regard to the patronage of the government to postal steamers, preceded any action of Congress on the subject; the first appropriation for that object, which was for the Bremen line, having been made June 19, 1846.[1]

The suggestions with reference to the communication by the Isthmus of Panama, besides our author's having the benefit of all the learning on the subject then attainable in Europe, were made on consultation with the venerable Humboldt, who, on all matters connected with this Interoceanic Canal, has, since his travels in Mexico and South America, in the early part of the century, been deemed the highest authority. Mr. Wheaton incorporated, in his despatch, the last views of the great traveller, on the practical accomplishment of a work, the value of which to the United States, at its date, was principally estimated by the saving of 10,000 miles, in the voyage, by Cape Horn and the North-west coast of America, to China; attention being then particularly attracted to the trade of that country, — an increased intercourse with which it was supposed would be effected by the treaty, recently concluded by Mr.

[1] Statutes of the United States, vol. ix. p. 19.

Cushing, with the Celestial Empire. The immense accessions subsequently made to our commercial facilities in the Indian Ocean, with the prospect of opening, through our means, to the trade of the world the Empire of Japan, have added greatly to the contemplated benefits of the proposed route, which, as well as the one through the Isthmus of Suez, it was suggested to put under the common guarantee of all the maritime powers, as part of the great thoroughfare of nations.[1] But though only

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[1] The mission entrusted to Commodore Perry, who was also the commander of the United States naval forces in the East India Seas, resulted in the conclusion of a treaty with Japan on 31st of March, 1854, establishing commercial relations with that empire. By it, after declaring that there should be a perfect, permanent and universal peace between the two nations, it was stipulated that Simoda and Hakodadi should be ports for the reception of American ships, where they could be supplied with wood, water, provisions, and coals and other articles that their necessities might require, as far as the Japanese had them; that whenever ships of the United States are thrown or wrecked on the coast of Japan, that Japanese vessels would assist them and carry their crews to Simoda or Hakodadi, and hand them over to their countrymen appointed to receive them, with whatever articles they may have preserved, without the refunding of expenses for the rescue and support of Japanese and Americans thrown on the shores of either country; that those shipwrecked persons and other citizens of the United States shall be free as in other countries, and not subject to confinement, but amenable to just laws — that shipwrecked men and other citizens of the United States shall not be subject to such restrictions and confinement as the Dutch and Chinese are at Nangasaki, but shall be free at Simoda and Hakodadi to go where they please within certain defined limits — that if there be any goods wanted or business requiring to be arranged, there shall be careful deliberation between the parties — that ships of the United States resorting to the ports open to them shall be permitted to exchange gold and silver coin and articles of goods for other articles of goods under regulations to be established by the Japanese government, and to carry away what they are unwilling to exchange — wood, water, provisions, coals, and goods required, are only to be procured through Japanese officers — that if the government of Japan should grant to any other nation or nations privileges and advantages not granted by the treaty to the United States or the citizens thereof, the same privileges and advantages shall be granted likewise to the United States and their citizens, without any consultation or delay — that ships of the United States shall not be permitted to resort to any other ports of Japan than Simoda or Hakodadi, and that agents or consuls shall be appointed by the United States to reside at Simoda, if either of the two governments deem the arrangement necessary, at any time after the expiration of eighteen months. A compact was also made, July 11, 1854, with Lew Chew, for supplies to vessels, and as to pilot-

some nine years have elapsed since Mr. Wheaton wrote, our title to Oregon had not then been admitted; the war with Mexico had not yet commenced; much less had California been ceded to us, and the foundations laid of a State on the Pacific, which already rivals, in wealth and commerce, the most flourishing of the Atlantic Commonwealths. The prosperity of these newly acquired regions has justly diverted the attention of the American people from a communication through foreign territory, with guarantees depending on the good faith of maritime and commercial rivals, and the very attempt to form which has occasioned serious diplomatic embarrassments, to direct routes across the continent, wherever convenience may dictate, wholly within our own sovereignty, and binding together, with bolts of iron, the confederated States, extending over the immense tract separating the two oceans.[1]

The close scrutiny, which the long pending negotiations with the Zollverein rendered necessary, into the economical policy of the German States, induced the Minister to acquaint himself with all the conventional arrangements of that nature, which Prussia and her associate States were contracting with other powers, in and out of Germany. We have thus the objections of Prussia to any member of the Confederation entering into a commercial union with a State foreign to Germany, while in

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age, wrecks, and a burying ground; and Americans are to have liberty to go over the island, subject to being, for bad conduct, arrested and reported to the captains of the ships for punishment. Cong. Doc. 33d Cong. 2 Sess., Senate Ex. Doc. 34, p. 153. The treaty of 1844 with China had been preceded by treaties with Siam and Muscat in 1833 and was followed by a treaty, in 1850, with Borneo. It had also been the intention of Commodore Perry to have entered into negotiations for a treaty with Cochin China.

[1] See the Clayton Bulwer Treaty of 19th of April, 1850, referred to in Part I., c. 2, § 14, page 55, note, and Part III., c. 2, § 5, page 328, note. Also the treaty of December 30, 1853, with Mexico, ceding territory through which, it is understood, a road may be constructed within the United States to California, and providing for the use by citizens of both countries, of the road that may be constructed across the Isthmus of Tehuantepec, as authorized by the Mexican government, 5th of February, 1853. U. S. Treaties, 1853–4, p. 124.

the refusal of the King of Holland to ratify a treaty for the union of Luxemburg with the Zollverein, we have an examination of the right of a sovereign to withhold his ratification, though the treaty has been made in strict conformity to instructions and in virtue of a full power.[1]

Reference is made, in connection with the mission to China, set on foot by Prussia for the purpose of promoting the general commercial interests of Germany, to the project, which was one of the objects of the short-lived Germanic Empire, — the establishment of a national unity, as regards the navigation interests, by the adoption of a system, which might do for shipping what the Zollverein had proposed for commerce. "For this purpose, a plan had been prepared by Dr. Smidt, Senator and Burgomaster, at Bremen, (who governs that town as Pericles governed Athens, with authority almost absolute, at the same time preserving the forms of a free State,) to establish a general union of all the maritime States of Germany, (including Austria,) for the purpose of protecting the common navigation interests of the entire Germanic Confederation. This *Schiff-fahrts Verein*, as it was to have been called, was to have been authorized to make treaties of navigation with foreign powers, for the purpose of securing to German shipping reciprocal advantages in foreign ports, to appoint consuls in those ports, and to adopt a common national flag."[2]

The anomalous position of a government, where religion is an affair of State, but where the sovereign and the people belong to different creeds, is presented in the case of the difficulties which arose between the King of Prussia and the ecclesiastical authorities of the Rhenish provinces, where the Catholic religion predominates. The dispute with the Archbishop of Cologne, in 1837–8, for refusing to submit to the king's views as to mixed marriages, and other questions regarded as matters exclusively

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[1] See Part III., ch. 2, § 5, p. 326, note.

[2] Mr. Wheaton to the Secretary of State, May 17, 1843.

of ecclesiastical cognizance, and which became almost a subject of European discussion, made the Prussian Cabinet anxious to oppose to the ultra-montane or Jesuit party of Germany the united force of the Protestant community.[1] A very favorite measure of the king to bring about this object was the blending of the Lutheran and Reformed Churches in one communion, to which effect, indeed, a decree was issued so far back as 1817. We have a notice of a conference of ecclesiastical and lay deputies, representing the different Protestant governments of Germany, assembled at Berlin, at the beginning of 1846, for the purpose of promoting unity of faith, discipline, and worship. The disappointment, however, which began to be felt at the evasions of the long deferred promise, made by Frederick William III., of a constitutional charter, did not aid the ecclesiastical projects of his successor; and, as Mr. Wheaton remarks, "under these circumstances a measure, which is intended to promote uniformity of faith and worship in the established national church, finds but little favor in public opinion, which tends more and more to tolerate dissent in religious matters, and to demand constitutional securities in political concerns."[2]

Mr. Wheaton's mission terminated, even before the promulgation of the edict of February, 1847, for convoking the Prussian Diet, and by which it was attempted, most imperfectly, to fulfil the promises made under the edict of the 26th of October, 1810, and the declaration of the 25th of May, 1815, of a constitution founded on popular representation. Consequently the revolutionary movements of the succeeding year are not within the particular scope of this notice.[3]

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[1] Mr. Wheaton to the Secretary of State, March 28, 1838.

[2] The Same to the Same, January 21, 1846.

[3] The North American Review for January, 1849, vol. lxviii. p. 220, contains an able paper, justifying the people of Prussia who, during the political ferment following the revolutions of 1848, took up arms to wrest from the government the liberal institutions so often promised, and as often evasively withheld. It is from the pen of Robert Wheaton, the only son of Mr. Wheaton, who survived

The old king, Frederick William III., who died in June, 1840, though not wanting in that personal courage which has ever distinguished the princes of the House of Brandenburg, had very little of that self-reliance which suggests and executes great revolutions. From his inveterate habits of self-indulgence and procrastination, he ever suffered the most urgent and important business to be neglected. As he frequently consulted, though he was the minister of the great rival of Prussia, Prince Metternich, whom he saw every year at the Baths of Toeplitz, on the affairs of his own kingdom, as well as on matters of foreign policy, it was not extraordinary that nothing was effected towards political reform in his life-time. The present sovereign, Frederick William IV., was described, on his accession to the throne, as "a man of exemplary morals, and a highly educated and accomplished prince."

In a notice of this nature it is impossible to present even an analysis of the despatches from Berlin, on the general questions of European politics. When his mission there began, the agitation consequent on the French Revolution of 1830 had not yet ceased; while in the premature insurrection of Poland, in the movements in Prussia and the other States of Germany, and in the attempts of the sovereigns to satisfy by the smallest concessions possible the popular demands, we have the germ of those demonstrations throughout Europe, to which subsequent events gave vitality. The severance of the Kingdom of the Netherlands, — the creation of the Congress of Vienna, with the separation of Belgium from Holland, — the result of the Revolution of Brussels, the miniature edition of that of Paris, obstinately resisted by the King of Holland, and the controversy respecting it, including the questions connected with the dismemberment of Luxemburg, in which the Diet of the Germanic

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him, and whose death, on the 9th of October, 1851, five days after he had attained his twenty-fifth year, redoubled the bereavement which his mother and sisters had experienced from the loss of his father. The article referred to is included in a "Memoir of Robert Wheaton, with Selections from his Writings," published in 1854, by his sister, now Mrs. Charles C. Little.

Confederation claimed the right to intervene, were not fully terminated till 1839. During the intermediate period, there were continued conferences of the Ministers of the five great powers, who, referring to the Protocol of Aix-la-Chapelle, of 1818, as an authority for the perpetual existence of the alliance, undertook, as early as 1831, to make a treaty for Holland and Belgium.

The nationality of Poland was one of the measures supposed to be secured, even when its territory was parcelled out at Vienna. The assurances, however, on that subject, which were without any effective guarantee, were destined to be illusory. In 1832, the Kingdom of Poland had become politically merged in the Russian Empire. The ultimate fate of Cracow, by which the existence of the Republic was annihilated, was not finally settled till after the date of Mr. Wheaton's last despatches; but we learn from them that, in 1836, the Minister of Foreign Affairs of Prussia would scarcely permit to be read to him the protests of England and France against the continued occupation of that free city.[1] And to the application of the Provincial Diet of the Grand Duchy of Posen, embracing that part of Poland occupied on the final partition by Prussia, for the political institutions stipulated for in the treaties of annexation, the king stated that the promise, contained in the declaration of 22d May, 1815, was not obligatory on him, inasmuch as his late royal father, who had substituted for it the edict of the 12th of June, 1823, had declared that its fulfilment was not binding on him, as not consistent with the welfare of his people. And in one of his last despatches Mr. Wheaton remarked, that Prussia was gradually blending the Grand Duchy of Posen with the German provinces of her dominions.[2] The affairs of the Peninsula, including the operations of the Quadruple Alliance, concluded in 1834, between England, and France, and Spain and Portugal,

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[1] Mr. Wheaton to the Secretary of State, June 2, 1836.

[2] The Same to the Same, April 22, 1846.

for the termination of the civil wars in the two latter countries, are within the scope of these papers, as well as the mediation of France between Naples and Great Britain, in 1840, the importance of which consisted in the settlement of the dispute without the intervention of Austria.

To the Emperor Nicholas, he was presented on occasion of his visit to Berlin, in 1838, and he again met him, the same year, at the Baths of Toeplitz. He had early said of him that "he had elevation of character to feel that to become the legislator of more than fifty millions, of so many various nations, tongues, and religions, is a far more noble object of ambition than a few barren trophies on the banks of the Danube. But in this, as in other respects, he had been obliged to yield to the genius of his nation." We have referred to the views which Mr. Wheaton conceived, at the commencement of his mission at Copenhagen, with regard to the ultimate fate of Turkey. And writing, soon after his arrival at Berlin, he says, what commands new interest from recent occurrences: "If I am not wholly misinformed, the Emperor of Russia is not disposed much longer to postpone the execution of those designs upon Turkey, which he has inherited from the traditionary policy of his predecessors — a policy, in the actual nature of things, requiring the possession of Constantinople and the Dardanelles, in order to give complete development to the natural resources of Russia, and to enable her to advance in the career of civilization, in which she is now impeded for want of the complete command of this channel of communication with the Mediterranean, and its rich coasts and islands. It is therefore believed that the Emperor Nicholas has reserved the conquest of Constantinople as the crowning glory of his active reign, and that circumstances alone will determine the choice of the moment for executing this project." On the same occasion he alludes to an opportunity, that he had had of inspecting the documents found in the cabinet of the Grand Duke Constantine, at the breaking out of the Polish Insurrection in 1830, and from which it appeared

that preparations had been made to threaten Austria with an insurrection of the Slavonic population of Hungary and Gallicia, had she attempted, in the campaign of the preceding year, which was terminated by the treaty of Adrianople, to disturb the Russian army in their march towards Constantinople. He also refers to propositions made by Russia to Austria, in 1835, and rejected by her, for an ample share in the partition of Turkey as well as to negotiations, arising out of their failure, with Prussia, by which the latter power was urged to hold herself in readiness to attack Austria in the rear on the Bohemian frontier, and to hold France in check by a military demonstration on the Rhine, while Russia moved on Constantinople by land and by sea. Mr. Wheaton, in the despatch from which we have already quoted, further remarked, that "so long as the treaty of Unkiar Skelessi remains in force, — so long as Russia keeps what the Emperor Alexander called the *keys of his house*, — it is plain that France and England alone, with the utmost exertion of their power and resources, could not prevent the occupation of Constantinople and the Bosphorus by a Russian fleet and army; and it is perhaps even doubtful whether, with the aid of Austria, they could prevent the accomplishment of this design, whenever the favorable moment arrives for its consummation."[1]

The various negotiations, from those of 1827, for the pacification of Greece, to the treaty of 1841, recognizing the closing to foreign ships of war, in time of peace, of the waters connecting the Mediterranean and the Black Sea, and which, while it shuts other nations out of the latter sea, also excludes the Russian navy from the former,[2] will be found cited in the "Elements," and will illustrate the international relations between Christian Europe

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1 Mr. Wheaton to the Secretary of State, December 9, 1835.

2 By the treaty between Russia and Persia, signed at Seiwa, (1813,) and confirmed at Teflis, under the mediation of Great Britain, Persia recognized the exclusive right of Russia to have ships of war in the Caspian Sea. Phillimore on International Law, p. 49.

and its Mohammedan State, anterior to the pending controversy.[1] England, in connection with one or more of the other great powers, by participating with Russia in her interference with the internal affairs of Turkey, constantly endeavored to prevent the exclusive protectorate of the Czar, (which seemed to have been permanently secured, in 1833, by the alliance of Unkiar Skelessi,) and to protract the duration of the Ottoman Empire as a barrier for the protection of her East Indian possessions, as well as a means to prevent the establishment of a great maritime State, for which the Sultan's dominions in Europe present such facilities. Apprehensions of the separate intervention of Russia, also, induced the other powers to take into their own hands the negotiations between Mohamet Ali and the Porte. And though France, a party to the subsequent treaty of 1841, refused, on account of the terms offered to the Pasha being less favorable than she deemed proper, to join in that of 1840, and which was therefore confined to Russia, Great Britain, Austria, and Prussia, the French Minister of Foreign Affairs, (M. Guizot,) expressly stated at the time, that, if the execution of the treaty should be resisted by the Pasha of Egypt, and a Russian army should be landed in Asia Minor, so as to produce a new complication, endangering the European balance of power, France resumed the right of acting as her honor and interest might ultimately dictate."[2]

In 1836, the "Elements of International Law" were published at London. The same year an edition appeared in Philadelphia, and a third one, in English, at the same place in 1844. An edition prepared by the author, with his latest emendations, was published, in French, by Brockhaus, at Leipzig and Paris, in 1848, and another edition was issued from the same press, in 1852–3.

The "Elements" were, at once, not only in the author's own

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[1] Part II., c. 1, §§ 9, 10, pp. 100–105.

[2] Mr. Wheaton to the Secretary of State, August 5, 1840.

country, but by the periodical press of England, France, and Germany, recognized as a standard treatise. They were introduced to the American student of public law by a gentleman known as a scholar, and experienced as a diplomatist, who, after having served his country at different courts of Europe, was lost to the cause of literary and historical research, at the moment when, as the fruits of a new mission to the East, the world was expecting to have unfolded to them the arcana of the Celestial Empire.[1] The able French journal, devoted to juridical science, recommended the work to the young French diplomacy, and urged its immediate translation. It does justice to the frankness with which Mr. Wheaton met the discussion of new and interesting matters, on which his predecessors had maintained silence; particularly on that delicate question, the right of intervention by one power in the affairs of another, which our author has, elsewhere, declared to be an "undefined and undefinable exception to the mutual independence of nations."[2]

The first edition of a Prize Essay, prepared for the Institute of France, under the title of "Histoire des progrès du droit des gens en Europe, depuis la paix de Westphalie jusqu' au Congrès de Vienne," was published at Leipzig, in 1841; and another edition, much enlarged, appeared there and at Paris, in 1846. A third one was also published by Brockhaus, in 1853–4. This work, whose object is to trace the progress which the law of nations has made since the treaty of Westphalia, occupies a place never before filled in the literature of the English language, or in that of any other. All students of jurisprudence, all students of history, who, not content with descriptions of wars and battles, rise to the grand principles, which are the sources of events, will regard this book as not

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[1] See an article in North American Review, vol. xliv. p. 16, by Alexander H. Everett, successively Minister to the Netherlands and to Spain, and who died Commissioner to China, in 1847.

[2] Rev. Etr. et Fr. tom. iv. p. 161.

less important than the Elements. An English translation appeared at New York, in 1845, under the title of the "History of the Law of Nations, in Europe and America, from the earliest times to the treaty of Washington, in 1842." Among the suggested ameliorations in the law of nations, which Mr. Wheaton discusses, was that of the establishment of perpetual peace, by the settlement of national disputes without resort to hostilities. Schemes have been, at different times, devised by philanthropists for the purpose of putting an end to all war; and he gives us in detail the plans of St. Pierre and Rousseau, of Bentham and Kant, for effecting this object. In some shape or other they are all referable to the principle of a general council of nations, which may serve as a great tribunal, whose jurisdiction all States are to acknowledge. The events of the last few years have not removed the objections that heretofore suggested themselves to the propositions for an Amphictyonic Council, which our author narrates historically. As stated in a review at the time, "this project cannot be deemed a wholly untried experiment. The Holy Alliance, when it parcelled out kingdoms at Vienna, sacrificing Poland to Russia, the greater part of Saxony to Prussia, and the ancient republics of Genoa and Venice to Sardinia and Austria; and when it met at Troppau and Laybach, to sustain the rights of sovereigns against their subjects, was exercising, under the most solemn sanctions of religion, that general superintendence over the affairs of Europe, which the philanthropists propose to vest in a general council. Great as have been the calamities of war, it may well be doubted whether they ought not to be encountered, in preference to a system which would divest every small State of the perfect independence which belongs to all sovereignties."[1]

The *compte rendu* of the original work, for the *Revue Etrangère*, was prepared by Pinheiro Ferreira, an eminent publicist, formerly the Minister of Foreign Affairs of Portugal, and who

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[1] North Am. Rev. vol. lx. p. 327.

had been the editor both of Vattel and Martens. It declares that "it bears evidence of the vast erudition of the author, showing that nothing which had been done or written that was remarkable was unknown to him; and that if there were defects in it, they were to be ascribed to the circumstances under which it was written, and which had prevented the author from giving to it the form that he would have adopted, could he have been allowed to follow the inspirations of his clear and methodical mind."[1] And in a subsequent volume, in which the American edition is announced, it is declared to have supplied all preceding omissions, and to have rendered the work a necessary compliment to the "Elements."[2]

A paper in the Edinburgh Review, from the pen of the jurist and political economist, Senior, under the head of the historical treatise, as it originally appeared in the French language, while it presents the difficulty of reducing to any general rules the practice of nations, and contests the author's views on the right of visit in time of peace, does justice to his preëminent fitness for his task. "Few men," it remarks, "are better qualified to write a history of the law of nations than Mr. Wheaton. A lawyer, a historian, and a statesman, he unites practical and theoretical knowledge, and he is the author of one of the best treatises on the actual state of that law, of which in the essay, the subject of this article, he is the historian." And in expressing the hope that Mr. Wheaton would translate it into English, he adds, "It would form an excellent supplement to his great work on international law. There are many persons in his own country and in ours, to whom it is inaccessible in its present form; and he must be anxious that his field of utility and of fame should be co-extensive with the English language."[3]

The German periodicals were not less decided in their com-

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[1] Rev. Etr. et Fr. tom. ix. p. 70.

[2] Rev. Fr. et Etr. tom. ii. N. S. B. 12.

[3] Edinburgh Rev. vol. lxxvii. p. 161, Am. ed.

mendation of Mr. Wheaton's treatises than those of England and France; though, as was remarked in the Leipziger Blætter für Literarischen Unterhaltung, the public attention had, in Germany, been long exclusively drawn to those questions of internal public law which regard the constitutional liberties of States, so that the study of that branch of public law, which is supposed to regulate their international relations, had been somewhat neglected. The importance of no longer leaving it as the pursuit of a particular class, but of popularizing the science of international, as that of constitutional law had been, and which would result from the admission of the moral personality of each particular nation, is insisted on. "To effect this requires the development, by such a writer as the enlightened author of the 'Elements of International Law,' of those fundamental principles which constitute the basis of the international law received among the civilized and Christian nations of the earth." M. Ludewig closes his notice, by declaring that "every student of this important science is bound to acknowledge his deep gratitude to the learned author, who, uniting the accomplishments of a public jurist and of a practical diplomat of the school of Franklin and Jefferson, to those of the scholar, already known by his other literary works, has furnished the best commentary on his Elements of International Law."

It is unnecessary to multiply citations from the public press. The references which have been made to the leading periodicals of the principal countries of the world, are only illustrations of what, everywhere, was the expression of enlightened criticism. That these were not mere evanescent marks of commendation, is now established by the fact that all subsequent publicists who have discussed international law, have treated Mr. Wheaton's works as permanent contributions to the science, and as authorities by which their own views are to be modified, and the decisions of cabinets regulated.

Of the systematic treatises which have appeared in England since his time, the most esteemed are those of Manning and

Reddie, both of whom discuss the controverted questions of maritime law, and the interpolations attempted to be introduced into it by the imperial decrees and orders in council, when France and England were contending belligerents. Mr. Manning, who wrote in 1839, while regretting that Mr. Wheaton had confined himself too much to those branches of the law which had received the adjudication of judicial tribunals, and not dilated sufficiently on the principles which must rest on the authority of reason, says: "Dr. Wheaton has written a work professedly elementary, and in which some parts are besides finished in a most instructive manner; he has cultivated the department of the subject which he had selected for his occupation with results that must afford pleasure and information to all who peruse his pages; and no one has a right to complain that he has not chosen a wider field, or devoted his time to a more laborious production. The interest derivable from his work is not such as merely to concern professional lawyers, but political students of every class will derive satisfaction from his pages. Dr. Wheaton's work is the best elementary treatise on the law of nations that has appeared, and it leaves the impression that the author's abilities might, had he so chosen, have given with advantage a fuller insight into the science which he illustrates." [1]

Mr. Reddie published, in 1842, his "Inquiries in International Law," in which, among the writers on the science, he enumerates the work of "the very able and learned American lawyer, Dr. Henry Wheaton, entitled 'Elements of International Law.' Availing himself not merely of the works of the old writers on the law of nations, but also of the more methodical and philosophical treatises of Martens, Schmalz, and Klüber, and of the labors of Martens, in the collection and arrangement of the treaties of the European powers, as constituting the conventional law of civilized nations, Dr. Wheaton has produced an

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[1] Manning's Commentaries on the Law of Nations, p. 44.

excellent work, which, although not British, is indisputably the best of the kind in the English language." In his subsequent treatise on "Maritime International Law," a large portion is devoted to an analysis of the principles elucidated by Mr. Wheaton; and he fully redeems the declaration in the introduction, in which he says: "Of that in most respects excellent author's works, his 'Digest of the Law of Maritime Captures,' his 'Elements of International Law,' his 'History of the Progress of the Law of Nations since the Peace of Westphalia,' and his late 'Inquiry into the Right of Visitation and Search, with reference to the Suppression of the African Slave-Trade,' we shall have occasion to speak with the commendation that is justly due to them."

A still later writer, Mr. Polson, though not agreeing with our author as to the title which he has given to his science, unites with the other publicists of his country in considering his work the most useful book on the subject extant;[1] while some of the most important positions of Phillimore's "Commentaries of International Law" rest for their authority on Wheaton's Elements. Phillimore, in introducing his work, remarks, that "the history of the progress of international law has been written by Ompteda, Miruss, and Wheaton, by the last author both in English and French, in a manner which leaves the German, the English, and the French reader but little to desire."[2]

Hautefeuille[3] and Ortolan,[4] whose books were justly esteemed the best exponents of the continental theories on maritime jurisprudence, (the work of the latter, indeed, being intended as a practical guide to the members of the naval profession, to which the author himself belonged,) abound in quotations from the treatises of Mr. Wheaton, to whom they unite in assigning the highest

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[1] Polson's Principles of the Law of Nations.
[2] Phillimore's International Law, Preface, p. vi.
[3] Droits des Nations Neutres.
[4] Diplomatie de la Mer.

rank in the science ; while the occasional criticisms in which they indulge show that their approbation is not devoid of discrimination. It may be added that the *compte rendu* of the latter's work, in the Review of Mr. Fœlix, is from Mr. Wheaton, and that he has not hesitated to adopt in the last edition of his Elements some of Ortolan's suggestions, especially in relation to the jurisdiction over merchant ships in foreign ports.

It may be remarked that the objections made to Mr. Wheaton's works, by the English and French commentators, are of an opposite character. While the former charge him with unfriendly sentiments towards their own country, the latter take exception at his vindication of those principles which our courts equally with those of England have heretofore maintained, in the absence of conventional stipulations, in reference to the conflicting rights of belligerents and neutrals, especially as to the claim of taking enemy's property from neutral vessels. So far as regards any partiality to the prejudice of England, the authority now conceded to him by the statesmen and publicists of that country is the best response ; and in the great debate, in which the principles of the Queen's declaration of 28th March, 1854, were vindicated by Sir W. Molesworth, on the part of the government, not merely on grounds of temporary expediency, but on considerations of permanent policy, Mr. Wheaton's works were referred to as the highest evidence of the existing law of nations, as well by the Minister of the Crown as by those who sustained the old system.[1]

On the other hand, it is to be remembered that the "Elements" do not purport to be an inquiry into what the law of nations ought to be independently of their usage, but what that law is, as recognized by the practice of nations. That no one would have more heartily rejoiced at the revolution effected by the recent adoption, during a state of war, of those principles which give immunity to neutrals, and which, however often to

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[1] See Debate in the House of Commons, July 4, 1854, Appendix.

be found, to a limited extent, in treaties, have always been disregarded after the breaking out of hostilities, is sufficiently apparent from Mr. Wheaton's own writings.

To his extra-official labors in preventing, through the Quintuple treaty of 1841, the application, in time of peace, of the right of search, which, if it exists at all, can only be exercised in war, we have heretofore referred. While Mr. Wheaton's early efforts were directed to the vindication of those rights of neutral commerce, and of the liberty of our fellow-citizens who were taken in derogation of our nationality from our ships, and which ultimately led to the war of 1812, we find, in a publication by him, in 1817, the Treaty of 1794 declared "an indelible disgrace of our national councils, because it sacrificed those rights which it was our bounden duty to maintain, as a member of the community of neutral States."[1]

Among Mr. Wheaton's papers, in the French Review for 1844, is one on the work of Mr. Heffter, Das Europaïsche Volkerrecht,[2] a book which is repeatedly cited in the first part of the "Elements," where a summary of that writer's system is given.[3]

Mr. Wheaton's old colleague at Copenhagen, Count Raczynski, was not only possessed of one of the best galleries at Berlin, but was the author of a magnificent work, giving an account of the brilliant and rapid progress of the Fine Arts in Germany, since the continental peace of 1815. This book was the subject of successive notices on the appearance of each of the three volumes, presenting in themselves a sketch of the great artists of the different states of Germany, as well as of their productions, and with which Mr. Wheaton's long residence in the

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1 Essay on the means of maintaining the commercial and naval interests of the United States. 1817.

2 Part I. c. 1, § 10, p. 14.

3 Rev. Fr. et Etr. tom. 1, N. S. p. 955.

country, and his frequent journeys, had made him personally acquainted.[1]

Nor were the fruits of these studies confined to the publication of a European periodical. In 1842, a society was established at Washington, under the title of the National Institute, which it was hoped might, from its location at the seat of government, combine in a literary and scientific association those Americans, who were engaged in the cultivation of liberal pursuits, and hereafter take a rank with similar societies in the capitals of the old world. To this association Mr. Wheaton conceived it his duty to communicate whatever information he had collected, that might be useful to his country, and with respect to which he did not correspond with the Department of State. His letters addressed to his friend, Francis Markoe, Corresponding Secretary of the Society, have never yet been published in a permanent form. They present a most instructive account of the state of modern art, as well of architecture as of painting and statuary. In one of them, indeed, we have a description of that recent monument of German nationality, of which Raczynski speaks at length, the Walhalla, near the ancient imperial city of Ratisbon, where it was intended to unite all these three arts, and in which are brought together the Teutonic celebrities, going back to Alfred and Egbert, of the Anglo-Saxon race, and Charlemagne, of the Franks. Nor in commemorating the foundation of the schools of Munich, Dusseldorf, and Berlin, and in familiarizing his countrymen with the names of Cornelius, Schadow, Wach, as well as with those of the architect Schinkel, and of the sculptor Rauch, and other contemporaries in fame, had he forgotten Thorvaldsen, the Dane, the glory of that country, where so many years of our author's life were passed, and whose death, after his return to the land of his na-

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[1] Foreign Quarterly Review, vol. 18, p. 109. Ibid. vol. 21, p. 89. Ibid. vol. 28, p. 455.

tivity, during the progress of these papers, presented a further occasion for referring to the great works in which he was engaged at Copenhagen, and with which his career terminated.

Recondite historical researches, for which his position afforded peculiar facilities, also occupy many columns of the Washington journal, in which the papers of the society appeared. The physical geography of Humboldt, the writings of Diderot, the geography of Affghanistan, with the war then (1842) raging in Central Asia, and the original object of which, on the part of the British, is described to have been to acquire a predominant control in that region, so as to guard against the contingent danger of Russian agents acquiring such influence among the Affghans as to be hereafter able to wield them, in conjunction with the Persians, as instruments of attack against the British dominions, were among the other topics of these communications.

Ancillon, Werther, and Canitz, successively Ministers of Foreign Affairs, were his personal friends, as well as the Chevalier Bunsen, the distinguished representative of Prussia at London, who, in introducing to him one of the Professors of the University, then engaged in writing a manual on the law of nations, says: "He fully appreciates the importance for him and his science to have access to one of the greatest European authorities, on many of the most interesting points of international law." He had in the Minister of England, Lord William Russell, the brother of the Minister of State, the Baron Meyendorf, the distinguished representative of Russia, and M. de Bresson, long the representative of France, intimate associates, whose letters, still extant, show that his intercourse with his colleagues of the diplomatic corps was such as exists among enlightened gentlemen, on an equal footing, as regards both attainments and social position. He was also a correspondent of that veteran diplomatist, Sir Robert Adair, whose entrance on the public service was coëval with the American Revolution. In transmitting to Mr. Wheaton a copy of the account of his mission to Vienna, in 1806, Sir Robert takes occasion to mention the fact, communicated to him by Mr. Fox himself, that he had

only consented to enter the Ministry, which succeeded Lord North's, on the pledge of the immediate unconditional recognition of the independence of the United States; and that his subsequent resignation was induced by the circumstance, that Lord Shelburne, who became Premier on the death of the Marquis of Rockingham, had previously, (on the ground that America was in his department, which, as Home Secretary, then embraced the colonies,) deputed Mr. Oswald to Paris, where Mr. Fox also sent Mr. Grenville.[1]

Mr. Wheaton's despatches contain accounts of interesting interviews with Metternich, whose name was so long synonymous with Austrian diplomacy. In a despatch of the 19th of July, 1838, which is here introduced as one among the many proofs that no opportunity was lost by him of using, for the advantage of his country, (whether or not the matter was embraced within his immediate functions,) the facilities which either his official rank or personal consideration commanded, he says: "I had yesterday a conversation of some length with the Archduke Francis, (who is a member of the council called the *Conference*, by which the government of the Austrian empire is administered,) and with Prince Metternich, (the real sovereign of that empire) both of whom appeared to me to attach great importance to the extension of the commercial intercourse between the United States and Austria. I did not fail to seize the occasion for intimating that the main obstacle, which had hitherto restricted that intercourse to a much less amount of exchanges than might have been expected from the great value and variety of the productions of the two countries adapted for exportation to each other, was to be found in the great inequality between their respective tariffs, and especially the discouragements created by the monopolies, lengthened quarantines, and other pernicious restraints on trade existing in the Austrian dominions. I insisted principally on the government monopoly of the trade and manufacture of

[1] See Sparks's Dip. Correspondence, vol. iii. p. 378, *et seq.*

tobacco, as being almost equivalent to a prohibition of our tobacco, only a small quantity of which is annually purchased by the Austrian *régie* at Bremen, to mix in with the Hungarian and other native tobaccoes."

But his associates were not confined to his professional brethren. Alone of the diplomatic corps, he was elected a foreign member, the number of which is limited to fifteen, of the Royal Academy of Sciences, where he had, as resident confrères, not only Alexander Von Humboldt, whose unrivalled attainments in physical science are universally recognized, but Ritter, distinguished in geography, Buch and Lichtenstein in natural history, Encke in astronomy, Rose and Mitscherlich in chemistry, Savigny and Eichorn in jurisprudence, Raumer and Ranke in history, Schelling and Steffens in philosophy, Boeckh in philology, and Bopp in the Sanscrit language and literature.

During the twenty years that Mr. Wheaton had been in diplomacy, he had received the most flattering assurances of the ability with which his duties were discharged, from all the Presidents under whom he had served, including Mr. Adams, Gen. Jackson, Mr. Van Buren, (who had also as Secretary of State been his chief, and as Minister in London his colleague,) Gen. Harrison, and Mr. Tyler ; and his course had been equally approved by all those who had had the charge of the Department of State, being, besides Mr. Van Buren, Mr. Clay, Mr. Livingston, (to whom he was also united by kindred pursuits as a scholar and a jurist,) Mr. McLane, Mr. Forsyth, Mr. Webster, Mr. Legaré, Mr. Nelson, Mr. Upshur, and Mr. Calhoun.

It was at the height of his celebrity, and when he might justly have looked for a transfer to one of the great courts of Paris or London, where his experience and peculiar acquirements might have been more useful to his country, that he received an intimation from the Secretary of State, of President Polk's intention to terminate his mission at Berlin, with a view to the appointment of a successor, and the opportunity was afforded him of anticipating his removal by the tender of his

resignation. It had been understood that, however general the rule of regarding our foreign missions as transient appointments, the importance of providing against unexpected exigencies would have led to the retaining abroad of at least one experienced diplomatist, through whom the government at Washington might have been advised of what was going on in the cabinets of Europe; and such would seem to have been the policy which, in Mr. Wheaton's case, had governed preceding administrations. Abroad, where our system of rotation in office, and from which, after what occurred in the present case, it cannot be supposed that any services however eminent, any fitness however unquestioned, can create an exception, the recall of Mr. Wheaton seemed scarcely susceptible of explanation. There was not a public journal in Germany that did not express surprise at the course of the American government, while his recall was the subject of an elaborate article in the Augsburg Gazette. The only reasons assigned for his removal were such as might well have been regarded as his highest recommendations for continued employment — his great experience and the services that he had already rendered. A distinguished senator and former colleague wrote to him, under the date of June 17, 1846; "I have been somewhat negligent in answering your letter. I should have replied more promptly, if I had had any thing satisfactory to communicate to you. But I had not. I stated your wish to remain in Europe, and also your high claims to consideration. But I find while your services and character are appreciated, there was a determination to shorten the terms of service of our diplomatic agents, and that the length of time you had been in Europe presented an insuperable objection to your transfer to another station."[1]

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[1] The act passed at the late session of Congress, "to remodel the diplomatic and consular systems of the United States," by abolishing outfits and the former allowance, on the return of ministers, would seem to contemplate a more permanent tenure of the diplomatic appointments than has hitherto prevailed. See Appendix.

The King of Prussia not only regretted Mr. Wheaton's departure, but could not conceive it possible that any government could make such a mistake, as voluntarily to deprive itself of such a minister. This we learn not merely from a formal discourse, where it might be regarded as a complimentary phrase, but from the private note of the confidential friend of Frederick William IV., who, on his part, could not regard Mr. Wheaton's recall otherwise than as the prelude to promotion.

"POTSDAM, ce 18 Juin, 1846.

. . . . . "Le roi génit souvent sur votre départ. Il sait combien vous nous étiez utile et il ne conçoit pas l'erreur d'un gouvernement, qui se prive d'un tel appui. Je suis sûr que le roi et la reine seront touchés de la délicate attention du voyage de Madame Wheaton. Je ne puis encore me persuader qu'on ne vous destine pas quelque grande place en Europe. Votre nom et celui de Mr. Gallatin restent hautement placés, et vous avez l'avantage sur lui d'excellens travaux historiques, c'est une grande et belle conception aussi que celle qui a ouvert la route du Nord des États-Unis par Trieste au Levant et dans l'Inde. On vous le doit. Agréez je vous supplie, mon cher et respectable confrère, l'hommage de mon inaltérable dévouement.

ALEX. HUMBOLDT."

The reference of Baron Humboldt is to the plan of communication across Europe, which is traced in one of the despatches, which has been noticed.

That the opinion expressed by Humboldt was no evanescent sentiment, we learn from an account of a visit to him, in Prussia, by our countryman Stephens, who will long be remembered for his graphic description of the monuments of Central America, and by the efforts, to which he sacrificed his life, to carry into effect those interoceanic communications to which the mind of Humboldt had been for so many years directed. "Baron Humboldt inquired about Mr. Wheaton, our late Minister to that country, and what was to be his future career. He said that it was understood at Berlin, that he was to be appointed

Minister to France, and expressed his surprise that the United States should be willing to lose the public services of one so long trained in the school of diplomacy, and so well acquainted with the political institutions of Europe." [1]

A despatch of 20th of July, 1846, thus announces the delivery of his letters of recall, on the 18th, at the palace of Charlottenburg: "I was introduced into the king's cabinet, and after delivering to his Majesty my letter of recall, I stated the President's desire to cultivate those amicable relations which had ever existed between the two countries, and which it had been my object to cherish during my long residence at this court. His Majesty was pleased to express his approbation of my zealous efforts to extend the commercial relations between the United States and the German States associated in the Zollverein, accompanied with many expressions of regard towards me too flattering to be repeated.

"I had afterwards the honor of dining with the king and queen, and finally took leave, with the repetition, on the part of both their Majesties, of the kindest sentiments towards me.

"My venerable friend, Baron Von Humboldt, had informed me that a copy of the magnificent edition of the Works of Frederick the Great, now publishing here, at the king's expense, would have been offered to me, had it not been that I was not at liberty to accept of any present from his Majesty. I took this occasion, to request, that a copy might be delivered to me for the use of the Library of Congress, at Washington. I accordingly this day received from Mr. Olfers, Superintendent General of the Royal Museum, the three first volumes of the work, to be transmitted to the President.

"I shall leave here, with my family, for Paris, on the 23d instant." [2]

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[1] New York Literary World.

[2] The following letter, which makes a reference, by way of pleasantry, to what Humboldt terms his Mexican citizenship, is so important, in giving a correct appre-

On Mr. Wheaton's quitting Berlin, he did not immediately return to the United States, but remained in Paris till the ensuing year. In that great capital he was no stranger. He had for some years (deeming it the best means of qualifying

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ciation of the position occupied by Mr. Wheaton and his family at Berlin, that we cannot refrain from its insertion : —

" Monsieur et très honoré confrère.

" Le Roi et la Reine ont été si touchés de l'expression de vos regrets et de la noble émotion de Mme. Wheaton, que le Roi au moment où je l'abordai ce soir (nous avons soupé en plein air sur la terrasse de Sans Souci, mais sous la triste impression de la mort récente de l'oncle du Roi résident à Rome,) que le Roi, veux-je dire, m'a consulté 'sur le souvenir affectueux que la Reine pourrait offrir à votre digne épouse en commémoration du vif intérêt que votre famille a inspiré dans ce pays.'

" J'ai dû lui dire qu'il venait au devant d'une chose à laquelle j'avais pensé ; q'un souvenir de peu de prix, mais contenant des images chéries, ne pourrait blesser dans le cercle magique des plus grandes sévérités Catoniques. Les formes de gouvernement ne peuvent altérer les affections sociales et les femmes ne sont pas soumises aux lois Draconiques. C'est avec une véritable effusion de cœur que le Roi permettra à la Reine d'agir pour elle seule. J'espère cependant que nous pourrons donner deux portraits au lieu d'un seul, sauf à ce que l'image du *tyran* sera rendu invisible lorsque l'aimable Mme. Wheaton se trouvera dans une réunion d'exaltation civique. Le Roi sait que je vous adresse ces lignes et il me charge de vous exprimer de nouveau en son nom, combien dans toutes les occasions, il a eu à se louer des sentimens de bienveillance et de modération que vous avez constamment déployés pour cimenter les liens qui unissent la Prusse à votre noble patrie.

" Je ne saurais vous exprimer assez vivement, Monsieur et excellent ami, combien je regrette de ne pas pouvoir quitter le Roi dans les deux seules journées très occupées, qu'il passe encore à Sans-Souci. Je ne l'ai pas accompagné l'autre jour à Charlottenbourg, ayant été forcé de tenir compagnie au Prince Frédéric des Pays-Bas, resté tout isolé ici. Quant à Vendredi, je ne conçois rien à ma mauvaise étoile. Je n'ai été absent de mon logement actuel au Chateau de Ville à Potsdam qu'une ou deux heures. M'aurez-vous peut-être cherché à Sans-Souci, où j'ai un logement aussi, mais que je n'occupe pas. S. M. la Reine enverra le souvenir qu' elle veut offrir à Mme. W. à Paris, en l'adressant à notre Ministre, le Baron d'Arnim, je désirerais cependant que vous me donnâssiez à moi votre adresse de Paris. Daignez m'écrire un mot dernier, avant votre triste départ. " Mille affectueux hommages,

" Votre ennemi politique,

" A. DE HUMBOLDT,

" à Potsdam, ce 19 Juillet. " Citoyen du Mexique.

" Je ne puis croire encore qu'on vous laisse quitter l'Europe, qu'on se prive d'un homme d'État comme vous."

himself for the discharge of his diplomatic functions to compare the views of the statesmen of different countries,) passed such time there, as his immediate duties in Prussia permitted. His sojourn in Paris was in nowise without direct profit to his country. His European reputation gave him a position with the public men of France, who were there, more than elsewhere, the men of letters and science, which no official rank could command; and a letter of this period, from a gentleman long in our diplomatic service abroad, ascribes to Mr. Wheaton's communications to Washington, written from Paris, the conciliatory tone of President Jackson's message of 1835, and which led to a satisfactory settlement of the difficulty, in reference to the non-fulfilment of the Indemnity Treaty of 1831 — a difficulty which had gone so far as to induce the proffer of the mediation of Great Britain. General Bernard was then a member of the king's cabinet, and we have likewise the evidence of his efforts, in the intercourse between him and Mr. Wheaton, founded on ancient associations, to terminate all dissensions between his own country and the one to whose hospitality he had been so long indebted; thus affording another proof, of which the acquisition of Louisiana, half a century ago—adjusted, as the French Plenipotentiary tells us, in friendly intercourse between him and the American Ministers, Mr. Livingston and Mr. Monroe—is a striking illustration, of how much may be effected, towards preserving the peace of the world by an accomplished minister, whose habits and acquirements place him on a footing of social communication with the members of the foreign government.[1]

On several other occasions Mr. Wheaton rendered essential service, in conferring, respecting our policy, with distinguished men, in and out of office—such as Thiers, Molé, De Broglie—with whom his intercourse was based on other than official considerations. This was the case not only in 1841–2, when the

[1] See Marbois's History of Louisiana, translated by an American Citizen, p. 280.

right of search was a subject of engrossing interest, but in 1844 – 5, when it was important that our course, as to Texas and Mexico, should be understood. In reference to these subjects, Mr. Calhoun, Secretary of State, says to him, in a private letter, dated December 26, 1844: — "You need no apology or explanation for your prolonged stay at Paris. I have no doubt that your time was efficiently and well employed at that great centre of diplomatic relations of the civilized world. To give correct impressions there is all important, in the present state of our relations with England, in reference to Texas, Mexico, and this continent generally. They are, indeed, much needed there. The policy of France is, at present, far from being deep or wise, in reference to the affairs of this continent. It ought to be, on all points, antagonist to that of Great Britain. Should I remain where I am, you may be assured I shall not be indifferent as to what relates to yourself."

In the case of our Oregon difficulties, having a thorough acquaintance with the whole subject, not only were his lucid expositions of importance, in the familiar intercourse which he had with Sir Robert Peel and Lord Aberdeen, but in putting our other representatives abroad in a position in which to vindicate and sustain our country's rights.

In April, 1842, Mr. Wheaton had been elected a corresponding member of the French Institute. Mr. Lackanal, through whom the appointment was communicated, states, that during the forty-seven years that he had been a member, he had never been present at so flattering an election, which was made on the report of M. Bérenger, peer of France, seconded by M. Rossi, likewise a peer of France, and who will be remarked by his untimely fate during the revolution at Rome, and by M. de Tocqueville. He adds, that he will undoubtedly be chosen one of the five free academicians, on the occurrence of the first vacancy. At the time of his admission the question was entertained, by the late Baron Degerando, whether he should be received in the section of History or of Jurisprudence. It was to the latter that he was attached.

During his stay in Paris he prepared and read before the Institute his Essay on the Succession to the Crown of Denmark, in which he elucidated from the facts, which his long residence at Copenhagen had made familiar to him, a question which soon thereafter became one of European importance. It was in quoting, after his death, his opinion on this subject, that the London Times says: — "We cannot mention the name of Henry Wheaton without a passing tribute to the character, the learning, and the virtues of a man, who, as a great international lawyer, leaves not his like behind."

Mr. Wheaton finally returned to his country in the spring of 1847. At New York, which had long been his residence, a public dinner was tendered to him for the 10th of June, the invitation to which was headed by the names of James Kent and Albert Gallatin, respectively the most eminent citizens in America, in the departments — Law and Diplomacy — with which his own fame was identified. The festival was presided over by the venerable Gallatin, and was attended, without regard to party, by all of the American metropolis who were distinguished in the various professions, or by their political station or social position. And when the Vice-President, Luther Bradish, presented their guest, "Henry Wheaton — we bid him welcome to his home and our hearts," the sentiment was responded to with enthusiasm. John Quincy Adams and Daniel Webster expressed their regret at their inability to participate, in person, in the public testimony of respect and gratitude to a citizen who had long contributed to the honor of our national character, both at home and abroad.

That his involuntary resignation might cause no stain to his untarnished escutcheon, the Secretary of State, Mr. Buchanan, declared; — "Mr. Wheaton richly merits this token of regard. He has done honor to his country abroad, and deserves to be honored by his countrymen at home. I offer you the following sentiment for the occasion — 'The Author of the Elements of International Law.' While we hail with enthusiasm the victo-

rious general engaged in fighting the battles of his country, our gratitude is due to the learned civilian, who, by clearly expounding the rights and duties of nations. contributes to preserve the peace of the world."

Reuben H. Walworth, then the highest legal functionary of the State of New York, and with whom the title of Chancellor expired, says:—"The ability with which Mr. Wheaton has discharged his diplomatic duties, during his long absence from his native country, and his valuable contributions to the science of international law, entitle him to this mark of respect from his fellow-citizens of New York." Edward Everett adds to his acknowledgment of an invitation to the dinner, in honor of Mr. Wheaton:—"He is one of those of whom we may well be proud. His public services abroad, for a term of years unusually long in our diplomacy, have been of the most important character. He has enriched the literature of the day, with an excellent work on an interesting and little-explored historical subject, and he has produced the most valuable general compend, which exists in our language, on the great science of international law."

A similar compliment was proffered to him by the most distinguished citizens of Philadelphia, including Mr. Dallas, then Vice-President of the United States. The City Council of Providence, by a formal vote, bade him welcome to the city of his nativity, and he was invited by his old townsmen to sit for his portrait, to be placed in the Common Council Chamber.

At the anniversary of his Alma Mater, on 1st of September, in 1847, his last literary discourse was pronounced.[1] It was

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[1] On the recurrence of this festival, four years afterwards, the following allusion was made to our author, in the response to the toast proposed by the President of the University, in compliment to the government of the State.

"I have referred to the lustre which your distinguished graduates have cast on Brown University; and I cannot allow the occasion to pass by, without a special allusion to the memory of one of the most illustrious of your alumni, one of whom, his native State, as well as this Seminary, may be justly proud; one whose friendship it was my happiness to possess during more than a quarter of a century, and with whom I was connected, not only by the ties of kindred pursuits, but

an Essay on the Progress and Prospects of Germany, and was delivered before the Phi Beta Kappa Society of Brown University. The Preussische Allgemeine Zeitung, published at Berlin, thus closes a notice of this discourse, and bears renewed testimony to the position which Mr. Wheaton held in the estimation of Prussia: — "That there exists in America a sincere wish to spread the knowledge of German life and culture, we find proof in the above-mentioned oration, delivered before a learned assembly in his native town, by one who, during a long residence in this place, had won our affection and respect by his simplicity of character, by his high moral sense, and his extensive knowledge. We refer to Henry Wheaton, well known in the learned and political world by his 'Elements of International Law,' a sketch of the 'Law of Nations from the Peace of Westphalia,' a pamphlet on the 'Right of Search,' and 'a History of the Northmen.' All these works show the profound inquirer, the accomplished statesman, the acute jurist, and, above all, the philosopher, who is capable of taking an enlarged view

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for a brief period as a colleague in the public service of the United States. I shall not here pronounce the eulogy of Henry Wheaton. Early instructed, after attaining the honors of this institution, in the languages and literature of Europe; after having received various marks of confidence from the State to which he had transferred his residence, and been for several years connected with that more than Amphyctyonic council, the Supreme Court of the United States; having already attained a distinguished rank in American literature, Mr. Wheaton entered the diplomatic service of his country; and during a career of twenty years, possessed of every accomplishment requisite to command the consideration of his associates, sustained prëeminently the reputation of the American name as one of her representatives abroad. But he did not confine himself to his mere official duties. His antiquarian researches and historical productions enrolled him among the literati of Europe, while his celebrated treatises on public law, laid the foundation of his permanent fame. His works are now authorities in the principal cabinets of Europe, and while he was living, I have often heard Albert Gallatin, then the Patriarch of American diplomatists, and whose last public appearance was as President of the festival to greet Mr. Wheaton's return to America, declare that he deemed your eminent alumnus the highest existing authority on international law. I will trespass no further but give you, — 'The memory of Henry Wheaton, the American expounder of International Law.'" Providence Journal, July 11, 1851.

of things, and discovering the connecting link between cause and effect. The last-mentioned quality is perceptible in this discourse on Germany. Although on some points we do not agree with Mr. Wheaton, and are inclined to attribute a higher meaning and deeper causes to German philosophy and our present religious movement, we cannot but acknowledge the justice of his general conception of our condition, and particularly of our historical development; and we rejoice to find that our national character, our culture, and our progress should be presented in their true light to the people of America."

Mr. Wheaton was to have read, during the ensuing winter, a course of lectures on International Law, before the Law Institute of Harvard University, preparatory to the establishment of a professorship of that science. The proposed task he was, however, never able to accomplish. While at Washington, where he was accompanied by the writer of these remarks, with a view to the discussion, in the Supreme Court, of the only points connected with his controversy with Mr. Peters, left open by the previous decision, he was attacked by a disease, which, though it did not prevent his return to his family, proved fatal, and he died on the 11th of March, 1848.

The object of this notice has been, to refer to Mr. Wheaton's career as an individual, only so far as it tends to illustrate his works. This, we trust, has been sufficiently done by the mere recital of the events of his life, connected with his literary and diplomatic career. The present is no occasion in which to indulge in giving utterance to sentiments inspired by private friendship; but Mr. Wheaton's unassuming deportment and purity of life may be mentioned, among the characteristics of the accomplished diplomatist: — "From youth to age," to use the words with which Charles Sumner closed his obituary notice, "his career was marked by integrity, temperance, frugality, modesty, and industry. His quiet unostentatious manners were the fit companions of his virtues. His countenance, which is admirably preserved in the portrait of

Healy, (taken for the city of Providence,) wore the expression of thoughtfulness and repose. Nor station nor fame made him proud. He stood with serene simplicity in the presence of kings. In the social circle, when he spoke all drew near to listen, sure that what he said would be wise, tolerant, and kind."

In closing this notice, it may be proper briefly to advert to transactions affecting the great questions discussed in this work, which have occurred since it underwent the last revision.

The Revolution, which commenced in France, in 1848, became, by subsequent events, like that of 1830, a mere dynastic change. As the resolution of the National Assembly, in May, 1849, recommending "a fraternal compact with Germany, the reëstablishment of Poland, and the emancipation of Italy," were without result, except as they may have encouraged abortive movements, attended with disastrous consequences to those who placed confidence in the declarations of France; and as, on the other hand, the great powers did not follow the course adopted, in the case of the Revolution of 1789, nor sanction any change in the number or position of the States of Europe, as in the separation of Holland and Belgium, the dethronement of Louis Philippe and of the Orleans branch of the Bourbon family furnishes, of itself, no matter for comment in a treatise of International Law.

The interposition of England and France in the war between Piedmont and Austria, did not occur till after the contest was virtually decided, and was a mediation in behalf of humanity, in nowise claiming to rest on any right of intervention authorized by the Law of Nations. Emphatically of that character were, also, the good offices proffered by England, in 1853, for the benefit of the Lombards naturalized in Sardinia, after receiving letters of denaturalization from Austria, which freed them from all allegiance, and whose property was, notwithstanding, being confiscated by the latter power, in violation of the treaty between the two States.

The mediation offered by England and France to the Sicilians, on the basis of separate political institutions for the two portions of the kingdom, and declined by them, was not sustained by arms; and the subjugation of the island by the Neapolitans followed.

The occupation of Rome by the French army more properly comes within the cases of intervention, which affect questions of international policy, than any of the preceding transactions; though it was avowedly made on grounds of an exceptional nature, arising from the peculiar character of the Holy Father as the head of the Church. Lamartine said, "As to Rome, France proposed to meet other Catholics on the subject of the Pontiff;" and "Austria, Spain, and Naples," it was stated by the Prince President as a motive for interference, "were coalescing to restore the Pope to the plenitude of his power. France would restore him to his liberty, but would have the right to give advice."

The case of Hungary, with the right, avowed by the United States, of acknowledging any nation which had established its independence in fact, without awaiting the action of its former masters, is fully elucidated in the correspondence between the American and Austrian governments;[1] and in the instructions to our Minister in Paris, on occasion of the assumption of the Imperial dignity by Napoleon III., the cardinal principle of our policy from the time of Washington, that every nation has a right to govern itself according to its own will, and to change its institutions at its own discretion, is reaffirmed.[2] The effective intervention of Russia, in the war between Hungary and Austria, on the appeal of the latter, was placed by the Czar on the ground of protecting himself against insurrection in Poland.

The never-failing plea of the preservation of the balance of

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[1] Part I. ch. 2, § 10, note *a*, p. 36.

[2] Part III. ch. 1, § 4, note *a*, p. 276.

power was invoked, in 1851, by England and France, to prevent the incorporation of the Austrian provinces, out of Germany, into the confederation, and to which Prussia had declared that she would not object, if all governments which wished it should be permitted to enter the Union on the basis of a federal State.

Phillimore, in his recent Commentaries upon International Law, enumerates among the cases of intervention the proposition, in 1852–3, of these same powers to the United States, and which preceded their present hostilities with the Emperor of Russia, to accede to a tripartite treaty, the object of which was to bind the three governments to renounce, both now and hereafter, all intention to appropriate the island of Cuba; or, in other words, as he expresses it, to abide by the *status quo* in the West Indies. And he adds, referring to the instructions of Lord John Russell to Mr. Crampton, of February 16, 1853, "The North American United States refused to be parties to this treaty; but the right of intervention, on the part of England and France, was steadily proclaimed, both on account of their own interests and on account of those friendly States in South America, as to the present 'distribution of power' in the American seas."[1] The inequality of such an arrangement, on the part of the United States, looking to their geographical position, and to the impossibility of their precluding themselves from an acquisition which, in a strategic point of view, might be essential to the defence of all our territory bordering on the Gulf of Mexico, is sufficiently elucidated in the correspondence, which passed between the American Department of State and the French and English ministers at Washington.[2]

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[1] Phillimore on International Law, vol. i. p. 466.

[2] The despatch of Lord John Russell, of February 16, 1853, referred to by Mr. Phillimore, was based on the answer of Mr. Everett, of December 1, 1852, which is to be found cited in Part II. ch. 1, § 3, note *a*, p. 88. The British paper, much of which is devoted to the facts by which the American Secretary of State

Nor can it be deemed otherwise than as a striking illustration of the difference of the principles, by which nations as well as

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vindicates the policy of his government, in declining the overture for a convention, says: —

"It is doubtless perfectly within the competence of the American government to reject the proposal that was made by Lord Malmesbury and M. Turgot, in reference to Cuba. Each government will then remain as free as it was before to take that course, which its sense of duty and a regard for the interests of its people may prescribe. . . . . .

"It would appear that the purpose, (of Mr. Everett,) not fully avowed, but hardly concealed, is to procure the admission of a doctrine, that the United States have an interest in Cuba, to which Great Britain and France cannot pretend. In order to meet this pretension, it is necessary to set forth the character of the two powers who made the offer in question, and the nature of that offer. Mr. Everett declares, in the outset of his despatch, that 'the United States would not see with indifference the island of Cuba fall into the possession of any other European government than Spain,' &c.

"The two powers most likely to possess themselves of Cuba, and most formidable to the United States, are Great Britain and France.

"Great Britain is in possession, by treaty, of the island of Trinidad, which, in the last century, was a colony of Spain. France was in possession, at the commencement of this century, of Louisiana, by voluntary cession from Spain. These two powers, by their naval resources, are, in fact, the only powers who could be rivals with the United States for the possession of Cuba. Well, these two powers are ready voluntarily to 'declare, severally and collectively, that they will not obtain, or maintain for themselves, or for any one of themselves, any exclusive control over the said island, nor assume nor exercise any dominion over the same.'

"Thus, if the object of the United States were to bar the acquisition of Cuba by any European State, this convention would secure that object.

"But if it is intended, on the part of the United States, to maintain that Great Britain and France have no interest in the maintenance of the present *status quo* in Cuba, and that the United States have alone a right to a voice in that matter, her Majesty's government at once refuses to admit such a claim. Her Majesty's possessions in the West Indies alone, without insisting on the importance to Mexico, and other friendly States, of the present distribution of power, give her Majesty an interest in this question which she cannot forego.

"The possessions of France in the American seas give a similar interest to France, which, no doubt, will be put forward by her government. Nor is this right at all invalidated by the argument of Mr. Everett, that Cuba is to the United States as an island at the mouth of the Thames or the Seine would be to England or France."

After discussing Mr. Everett's remark, that the conclusion of the proposed treaty, instead of putting a stop to lawless expeditions against Cuba, would give a

individuals judge of their own conduct and that of their neighbors, that, at the time that England was united with France, in

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new impulse to them, the correctness of which position is questioned, Lord John Russell concludes: —

"Nor can a people so enlightened fail to perceive the utility of those rules for the observance of international relations, which, for centuries, have been known to Europe by the name of the law of nations. Among the commentators on that law, some of the most distinguished American citizens have earned an enviable reputation, and it is difficult to suppose that the United States would set the example of abrogating its most sacred provisions.

"Nor let it be said that such a convention would have prevented the inhabitants of Cuba from asserting their independence. With regard to internal troubles, the proposed convention was altogether silent. But a pretended declaration of independence, with a view of immediately seeking refuge from revolts on the part of the blacks, under the shelter of the United States, would be justly looked upon as the same in effect as a formal annexation.

"Finally, while fully admitting the right of the United States to reject the proposal that was made by Lord Malmesbury and M. de Turgot, Great Britain must at once resume her entire liberty; and, upon any occasion that may call for it, be free to act, either singly or in conjunction with other powers, as to her may seem fit."

Mr. Crampton, addressing, April 18, 1853, the Earl of Clarendon, who had succeeded to the office of Secretary of State for Foreign Affairs, says, that the foregoing despatch was read to the American Secretary of State, Mr. Marcy, and a copy delivered to him, and that, at the same time, a communication, of similar import, was made to him by the French Minister. Mr. Marcy, it is added, replied that: —

"It would, of course, be necessary for him again to read over the despatches, in order to comprehend their full import; but, as far as he could now judge, the opinion of the two governments seemed to coincide in reference to two points, namely, the one, that the right of the United States to decline the proposals made to them by the English and French governments was admitted; the other, that some of the general positions taken by Mr. Everett, in his note of the 1st of December, 1852, appeared to those governments to render a protest against them on their part necessary, lest it might hereafter be inferred that those positions had been acquiesced in by them.

"We replied that, without pretending to point out to Mr. Marcy what further step he was or was not to take in this matter, the object which our respective governments had in view seemed to us to be, generally, such as he had stated it; and that we, for our part, considered the discussion of the subject closed, by the communication which we had just made.

"Mr. Marcy appeared to receive our observations in a conciliatory manner, and concluded by expressing his hope and belief, that no misunderstanding would arise between the great maritime powers in regard to this matter."

an attempt to arrest the natural development of the resources of the United States, an addition of four or five millions of

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This note would not be complete without including, in the same connection, the following extracts from Mr. Marcy's instructions to Mr. Buchanan, Minister in London, dated July 2, 1853: —

"I ought not to close this communication without indicating the views of the President, in relation to the intervention of Great Britain, in conjunction with France, in the affairs of Cuba. These powers proposed to this government, in April, 1852, to enter into a tripartite convention, for guaranteeing the Spanish dominion over Cuba. The proposition was very properly declined. To this course neither England nor France could justly take exceptions; but they have conjointly expressed dissatisfaction with certain parts of the letter of Mr. Everett, rejecting their overture. . . . At this time I shall only state the fact, that a distinct intimation is conveyed, by both England and France, that they will resist the transfer of Cuba to the United States, and assist Spain in case of any foreign interference in aid of the Cubans, whether openly or covertly applied, in any attempt they may make to escape from the Spanish yoke.

"The course of England and France, in sending their ships of war on to our coast during the late disturbances respecting that island, without previous notice or specification of their object, and the supervision they claimed to exercise along that coast, were (to use the mildest expression) not respectful to this republic. . . .

"For many reasons, the United States feel a deep interest in the destiny of Cuba. They will never consent to its transfer to either of the intervening nations, or to any other foreign State. They would regret to see foreign powers interfere to sustain Spanish rule in the island, should it provoke resistance too formidable to be overcome by Spain herself. . . .

"When it was understood that Spain had applied to the allied sovereigns of Europe for assistance, to recover her revolted colonies in America, the government of the United States protested in emphatic terms against such a procedure, and if the protest had failed in its object, this government would undoubtedly have had recourse to other means to arrest such interference. . . .

"Cuba, whatever may be its political condition, whether a dependency or a sovereign State, is of necessity our neighbor. It lies within sight of our coast. In carrying on trade between some of our principal cities, our vessels must pass along its shores. Intercourse with it is unavoidable. Standing in that geographical relation, it is imperative upon us to require from it, whatever may be its condition, all the observances imposed by good neighborhood. It must be to the United States no cause of annoyance in itself, nor must it be used by others as an instrument of annoyance. . . .

"We should very much regret that the general condition of things in Cuba, or any particular occurrences there, should be such as to act so powerfully upon the feelings of individuals among us, as to impel them to any unlawful enterprises against that island; but if, unhappily, that should be the case, the government of the United States will do its whole duty to Spain, and use all the repressive

inhabitants with a territory of proportionate extent, was made to the British Empire in India, by the annexation of Pegu, in Burmah, not only without any protest on the part of any foreign power, but without a word being uttered in Parliament on the subject, except to allude to the fact.[1]

The whole policy which, since Spain by the independence of her continental possessions has ceased to be an important American power, has governed the United States, with reference to Cuba, was fully disclosed in the papers communicated by President Fillmore to Congress, in July, 1852, and which comprise the correspondence on that subject, going back to 1822. At that period, England, not apprehending the embarrassments which, since the emancipation of the negroes in her own islands, the character of the population would occasion her, desired the possession of Cuba, to give her the command of the Gulf of Mexico; and it was particularly feared that, should she take the side of Spain, in the war in which the latter was about to be engaged with France, the price of English interposition might be the cession to her of the two remaining islands of Cuba and Porto Rico. Our policy ever has been that, while we were content that those islands should remain with Spain, and would infringe no obligations of good neighborhood to obtain them, otherwise than by her voluntary act, we would never allow them to pass into the hands of any great maritime power. Not only

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means authorized by law, or required by honor, to restrain our citizens within the limits of duty. In this respect, Spain will have no good cause to complain, or any other nation a fair occasion to intervene. . . .

"In spite of all that has been promised by Spain, and all that has been done by other powers, to suppress the slave-trade, the possession of Cuba favors its continuance, and is a formidable obstacle to its suppression. . . .

"If you should ascertain that Great Britain has entered into any engagements with Spain, to uphold this connection with Cuba, under any modification of it which is likely to be injurious to the United States, or to the well being of the other governments on this continent, you will have recourse to such arguments and persuasions as, in your judgment, will induce her to abandon them."

[1] Hansard's Parl. Hist. vol. cxxvii. p. 432.

have England and France been constantly apprised that we would not consent to their occupation by either of them, but, in 1826, at the same time that it was officially announced to France, "that the United States could not see with indifference Porto Rico and Cuba pass from Spain into the possession of any other power," we effectually intervened with Mexico and Colombia to suspend an expedition which these republics were fitting out against them. The United States, however, even at that period, explicitly declared to Spain that they could enter into no engagement of guarantee, as such a course was utterly inconsistent with our standing rules of foreign policy.[1] The most recent indications, also, of the views of the American government confirm the preceding statement, and show that, while we deem the acquisition of Cuba of the highest importance, and would give more than a full equivalent to Spain for a transfer to us of its sovereignty, we will not, without a more imminent necessity than now exists, make her refusal to sell it to us a ground for taking forcible possession of it, as essential to the safety of the Union.[2]

Of the pending contest, which may decide the permanent destiny of that part of Europe now under the dominion of, or subject to, the *suzeraineté* of the Porte, so long an excrescence on the European body politic, it is beyond our province to speak, except to record, as has been done in the notes, its ostensible origin; — on the one side, the intervention claimed in pursuance of treaties in favor of the Christian population of Turkey; and on the other, the preservation of the Ottoman Empire, as of essential importance to the balance of power among the States of Europe.[3] Since our annotations were prepared matters have become more complicated, without, however, essentially changing their character. After the failure to substitute for a

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[1] Cong. Doc. 32d Cong. 1st Sess., H. R. Ex. Doc. 121.

[2] Mr. Marcy to Mr. Soulé, November 13, 1854.

[3] Part I. c. 1, § 10, p. 21.

treaty a diplomatic note or an arrangement to be effected by means of a protocol, signed by the representatives of England, Austria, France, and Prussia, to be assented to simultaneously by Russia and Turkey, war had been declared, on the 4th of October, 1853, by the last-named power, against the Emperor of Russia. On the 28th of March following, England and France had also placed themselves in hostility to the Czar, while Austria and Prussia, parties to the original conferences on the affairs of Turkey, yet continue their diplomatic relations with the Court of St. Petersburg, though in virtue of the Treaty of June 14, 1854, with the Porte, the former occupies the Danubian principalities vacated by Russia; and so early as the 20th of April, of the last year, an alliance was formed between Austria and Prussia, to take effect, in case Russia should incorporate the principalities as well as advance towards the Balkan, and which, by the treaty of the 25th of November, was extended, so that Prussia was to assist Austria if attacked in her own dominions or in the principalities. To these arrangements the Germanic Confederation became a party, by their resolutions of the 28th of July and the 9th of December. On the latter occasion they affirmed the four points hereafter alluded to, which were agreed on in the notes exchanged on the 8th of August, between England and France and Austria, as the necessary basis of peace. But Prussia was no party to the treaty of the 2d of December, by which, in certain contingencies, an alliance offensive and defensive is established between Austria and England and France; and it is understood that the Minister of Frederick William IV., who is supposed to be bound, not only by family ties but by political sympathies with the Emperor of Russia, is with difficulty admitted, though a member of the original conference, to the negotiations for peace to be opened between Austria, France, and England on the one side, and Russia on the other. Again, the two great German powers are opposed to one another in the Diet; and, through the influence of Prussia with the minor States, the proposition of Austria for the mobilisation of the Federal Army

has been neutralized; while Sardinia has, by her treaty of the 15th January of the present year, with England and France, not only given her adhesion to the alliance against Russia, but agreed to furnish a military contingent for the war, in which arrangement it is said that other powers are about to follow. And, at the moment that we are closing these sheets, all calculations are set at naught by the intelligence which reaches us of the sudden demise of the Emperor Nicholas, the great master spirit, who seemed prepared, if necessary, to contend singly with coalesced Europe.

In this controversy it is for the publicist to notice, that though England and France have embarked in the war to maintain the Ottoman Empire in its present extent, yet that that exclusive internal sovereignty over all the inhabitants of a territory, whether subjects or residents, deemed essential by the public law of Christendom to the independent existence of a State, does not seem to be contemplated for the Porte, by any party. Humanity would forbid the withdrawal of the people of other nationalities from the protection of their diplomatic and consular representatives, a system which distinguishes the international code of the Asiatic family of nations, to which the Turks properly belong, from the European. But there is this marked difference between the Ottoman Empire and the other Mohammedan and Pagan States, that, while in the latter the people of different religions are confined, with comparatively unimportant exceptions, to foreigners engaged in commerce, or to travellers passing through their territory, the great majority of the inhabitants of Turkey in Europe, and in the Danubian principalities the entire population, profess the Christian creed.

Of the utter inability or total disinclination of the government of Turkey, so far, at least, as strangers are concerned, even to maintain an adequate police within its own dominions, sufficient evidence was afforded in the case of Kostza, which, in 1853, formed the subject of a diplomatic discussion between the United States and Austria. Whatever the merits of the controversy, as regards these parties, it cannot be questioned

that the territorial sovereignty of the Ottoman Porte was violated, without the slightest interposition of the local authorities, or any subsequent reclamations on the part of the government at Constantinople; and it was assumed in the American argument, that "all parties were in the same condition at Smyrna, in respect to rights and duties, so far as regards that transaction, as they would have been in if it had occurred in their presence in some unappropriated region, lying far beyond the confines of any sovereign State whatever."[1] To the anarchy of which this transaction was an illustration, the leading journal of Great Britain thus alluded at the time: "It is one of the most unfortunate results of the present condition of the Ottoman Empire that the authority of its officers is hardly sufficient to command respect in its own ports, and that the laws of the country and the law of nations are violated with impunity under the very eyes of the Sultan's representatives."[2]

Nor has the anomalous condition of Turkey escaped the notice of English writers. The very recent commentator from whom we have cited, while objecting to the absorption of the Sultan's dominions in any of the existing States, says: "It is not, indeed, true, that Christian Europe requires, as a condition of her security, the existence of a Mahometan power within her boundaries. It is conceivable that Constantinople may again become the seat of a Christian Greek government, capable of maintaining the position and supporting the character of an independent kingdom; and were such an event to occur, the balance of power might be at least as well secured as by the present state of things."[3]

The propositions made by the other powers to Russia, and which constitute the basis of existing negotiations, do not suggest the emancipation of the Porte from any previous thraldom which it was under to foreign States, but merely the transfer to

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[1] See Part II. c. 2, § 6, note, p. 131.

[2] London Times, July 20, 1853.

[3] Phillimore's International Law, vol. i. p. 461.

the five powers, with the right of intervention consequent thereon, of the protectorate of the principalities of Wallachia and Moldavia, where Russia has a concurrent voice in the choice of the Hospodars, and of Servia, where she has the right of supervising the election of the prince. They are, also, to exercise together the guarantee, accorded by existing treaties to Russia, of the privileges enjoyed by the Christian population of Turkey. Another of the four points, (the remaining one relating to the free navigation of the Danube,) proposes a revision of the treaty of 1841, which recognizes, as the ancient rule of the Ottoman Empire, the closing to ships of war, in time of peace, of the Straits of the Dardanelles and the Bosphorus—a matter which, from their territorial possessions around the Black Sea, would, under ordinary circumstances, be within the exclusive control of Turkey and Russia; but which, as we have seen, has been recognized by both these States, as within the cognizance of the general policy of the great European powers. Turkey had, indeed, by the treaty of Unkiar Skelessi, (when the Czar volunteered to put down, in Mehemmet Ali, the Pasha of Egypt, the establishment of a new Mohammedan dynasty, whose success might delay the consummation of his long deferred designs,) agreed to close these Straits against foreign ships at the request of the Emperor of Russia, by way of reciprocity for his covenanting to assist the Porte with a naval and military force, whenever required so to do.

How far the political institutions of the Ottoman Empire and its international relations, permitting the continued intervention of foreign States in its internal affairs, are from being assimilated to those of the rest of Europe, is furthermore apparent from the fact that the existing war was preceded by the revival of conflicting pretensions of Russia and France, in behalf of the Greek and Latin Churches, respectively, to the holy places, connected with the nativity and important passages in the life of the common Saviour of Christians, situated in the territory forming an integral part of the Turkish dominions; while

Austria, as well as Russia, was intervening in the relations between the Porte and Montenegro, whose new prince had just repudiated the ecclesiastical character which, in his predecessors, had been blended with the civil magistracy. England was then, also, as she had long been, engaged in obtaining for the Armenians and other subjects of the Porte a separate recognition. Indeed, her Parliamentary papers, for several years back, are replete with reports from her diplomatic and consular agents in Turkey, showing an active surveillance by them over the internal administration of affairs, and that they were constantly menacing the local authorities of Syria with the intimation of insurrectionary movements on the part of the Christian population, and to which, they were given to understand, that their co-religionists might not remain strangers.[1] Nor can it be forgotten in this connection that it was a violation of stipulations of the treaty of Bucharast in favor of the Servians, which led, in 1813, when the protecting power was occupied with the war with France, to that insurrection, the cruelties of which, equally with the atrocities exercised in the Morea, aroused the sympathy of all Christendom against Turkey.

It has been our duty to point out, in the annotations, the important changes that have occurred, since Mr. Wheaton's time, in the maritime law of nations. At least, for the present war, the most liberal course has been adopted by all the belligerents. In reference to the rule, "free ships free goods," which has been usually connected, for no better reason, it would seem, than that it formed a verbal antithesis, with the proposition, "enemy ships enemy goods," the conflicting views of England and France have been conciliated in a way resulting greatly to the benefit of neutrals; while Russia has, by a treaty with the United States, and to which all other nations have been invited to

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[1] Parliamentary Papers, 1843, vol. lx. p. 27, *et seq. inter alia.*

become parties, consecrated anew those principles of which the Emperor Nicholas had a claim to be the hereditary champion.

By the treaty of July 22, 1854, immunity is given to neutral property on board of enemy's vessels, as well as to enemy's property on board of neutral vessels, with the exception of contraband of war, which may be confiscated, whether on board of neutral or enemy vessels.[1] Though it is to be presumed that the penalty, in the case of contraband found on board of a neutral carrier, is by the treaty limited to the confiscation of the interdicted article, and is not to be extended, as by the Russian decrees at the commencement of the war, to the condemnation in all cases of the vessel carrying it, and in which respect the ordinances of that power differ from those of the allies;[2] yet it is to be regretted that, by continuing to subject to capture under the term of contraband of war, the definition of which has varied in the maritime codes of different nations, and of the same nation at different times, articles on board of a neutral vessel destined to an enemy's port though not blockaded, the evils to neutrals, inseparable from a right of search, are perpetuated, without any correspondent benefit to the belligerent. The law of blockade, it is conceived, effects the exclusion of contraband of war in the only cases in which, in the present state of commerce and the arts, the prohibition can be of any importance as regards belligerent operations.

A treaty, in the same terms with the one between the United States and Russia, was signed with Mexico, on the 8th of January, 1855; and another, with the King of the Two Sicilies, on the 13th of that month.

Other points of maritime law have also been recently discussed in the cabinets of Europe. Much greater liberality prevailed, at the commencement of the present hostilities, than on any previous occasion, in reference to the property of one belli-

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1 Part IV. c. 3, § 23, p. 543, note *a*.

2 Ibid. c. 3, § 27, p. 573, note.

gerent found in the country of the other; and which would, according to the former practice of England, have been confiscated as droits of Admiralty. Though privateering has not been formally abolished, and such a proposition cannot be acceded to by a power, situated like the United States, with a great mercantile marine, without a correspondent navy, while the capture of private property by government ships is tolerated; yet England and France, the superiority of whose fleets over those of Russia give to them the command of the ocean, have continued to adhere to the course adopted by them at the commencement of the war, and have abstained from issuing commissions to private armed vessels.

Great changes have, likewise, been introduced, in reference to trade with an enemy. This, in the last war between England and France, was forbidden by the recognized law of nations, to the merchants of the contending belligerents, under the penalty of confiscation; while it was effectually interdicted to neutrals, under the plea of the rule of the war of '56, interpolated by Great Britain into maritime law, and by Orders in Council and retaliatory decrees. Now, instead of its being limited to an irregular commerce through licenses, every facility, consistent with a state of hostilities, is accorded by the maritime powers, as well to their own subjects as to neutrals, for the continuance of the ordinary commercial intercourse with all places not blockaded, and in all articles not contraband of war. And, it may not be irrelevant here to state that, in the most recent discussions in the British Parliament, the proposition for a recurrence to the system of former wars was most emphatically repudiated, and those views, which had been so ably elucidated at the previous session by Sir William Molesworth, were defended by the Minister of the Crown, to whose department the subject appropriately belongs.[1]

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[1] Mr. Cardwell, then president of the board of trade, argued strongly against old absurdities. It would not be prudent, he said, to announce to neutral countries that

Nor have the negotiations of our government with foreign powers been confined to matters relating to a state of war.[1] The immense additions made to the Union, with the revolution produced in the nature of the precious metals by the substitution of an Anglo-American population in territory long, for little purpose, under the dominion of Spain and Mexico — the acceptance by that power, with which our most extensive trade is carried on, (and which had previously given its adhesion to liberal principles by the abolition of prohibitory enactments in relation to the importation of articles that contribute directly to the sustenance of human life,) of the proffer made by us to all the world, more than a quarter of a century ago, of the reciprocal abolition of discriminating duties on navigation, without reference to the origin of the cargo, and which has been followed by England's going beyond us in the march of free trade, and laying open her coasting trade — the expansion given to our commerce by the treaty with Japan and the measures adopted to confirm our diplomatic relations with China and the other countries of the remote east — the treaties for opening the great rivers of South America to the enterprise of our citizens, and

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England contemplated a renewal of the "right of search for enemy's property in neutral vessels;" and it would be impossible to carry out a decree of prohibition of Russian produce; and he went over a most instructive history of former attempts to crush trade in a time of war, showing that they had fostered immorality, fraud, and perjury. Such measures, too, he remarked, would be sure of inflicting the *minimum* amount of injury on Russia and the *maximum* amount of injury on England. Debate in House of Commons, February 20, 1855.

[1] Various treaties affecting our intercourse with foreign States have been alluded to in the course of the work, or have been noticed in the Introductory Remarks. To them may be added an extradition treaty with Hanover, signed January 18, 1855, and one, for the abolition of the *droit d'aubaine* and *droit de détraction* with Brunswick Lunenburg, of the 21st of August, 1854. A consular convention was likewise concluded, on the 22d of January, 1855, between the United States and the Netherlands, with which latter power we had, by the treaty of August 26, 1852, consummated the principles of commercial reciprocity, by including within the conventional provisions, which opened the ports of each country to the vessels of the other, with whatever goods laden, on the footing of national vessels, the colonies and dominions of Netherlands beyond the seas.

the application, between us and England, to the St. Lawrence of the principles of public law recognized at the Congress of Vienna as to the rivers of Germany, with the removal of restrictions from a free reciprocal interchange of commodities with our neighbors on this continent, with whom we are connected by the ties of a common origin, language, and religion, and which, by the increased intercourse, must lead to a commercial union, if not ultimately to a more intimate association — these are all among the events comprised in the brief period, that has intervened, since the last publication in America of the "Elements of International Law."

In the preparation of the present edition, that of Leipzig, of 1848, which had received the latest corrections of the Author, has been adopted as the standard, though matter contained in previous editions and there omitted, as being specially applicable to the United States, is now retained. No liberty has been taken with the original text, except to translate and insert such additions as were made to the French publication, and of which no English manuscript could be found.

The new notes, which are marked in [brackets,] have been confined almost exclusively to a reference to events which have occurred since the last edition, or to works which were not published, when the Author's emendations were made. In this connection, the Editor would state that, not only have the papers of Mr. Wheaton been placed at his disposal, but that, through the courtesy of the Secretary of State, he was enabled to examine the portion of his correspondence with the government, of which copies are not in possession of the family.

W. B. Lawrence.

Ochre Point, Newport, Rhode Island,
March 17, 1855.

PRÉFACE

A L'ÉDITION DE 1848. PARIS ET LEIPZIG.

La première édition de cet ouvrage a paru à Londres, en 1836, en anglais, et a passé par deux autres éditions dans la même langue, publiées à Philadelphie, et revues, corrigées, et considérablement augmentées par l'auteur. En écrivant cet ouvrage, il s'est proposé de réunir dans un livre élémentaire, destiné à l'usage des diplomates et des hommes d'état, l'ensemble des règles de conduite qui doivent être observées dans les rélations mutuelles des nations, en temps de paix et en temps de guerre. Le droit international, ou droit des gens positif, est fondé sur la morale internationale, qu'on a ordinairement appelée le droit des gens naturel. La plupart des règles dont se compose le droit international, sont tirées des exemples de ce qui, dans la pratique variable des nations civilisées, a été approuvé par le jugement impartial des publicistes et des tribunaux internationaux. Ces précédents se sont accrus en nombre et en importance durant la longue période qui s'est écoulée depuis la publication de l'ouvrage classique et justement estimé de Vattel, période abondante en discussions instructives entre les cabinets et dans les tribunaux et les assemblées législatives de diverses nations concernant leurs relations politiques et leurs devoirs mutuels. L'auteur a puisé à ces sources les principes généraux qu'on peut regarder comme ayant reçu l'assentiment de la portion la plus éclairée du genre humain, sinon comme règles de conduite invariables, du moins comme règles qu' aucun état ne peut violer sans encourir l'opprobre

général, et sans s'exposer au danger de provoquer les hostilités d'autres états indépendants dont les droits seraient lésés, ou dont la sécurité serait menacée par leur violation. L'expérience démontre que ces motifs fournissent une certaine garantie, même dans les temps les plus malheureux, pour l'observation des règles de justice internationale, s'ils n'accordent pas cette sanction parfaite que le législateur a annexée au droit interne de chaque état particulier. La connaissance du droit public externe a donc toujours été regardée comme étant de la plus grande utilité à tous ceux qui prennent part aux affaires publiques, et surtout à ceux qui sont destinés à la carrière diplomatique. L'auteur a été encouragé par la faveur accordée par le public aux éditions précédentes de son ouvrage à faire publier cette nouvelle édition en langue française.

H. WHEATON.

PARIS, *le* 15 *Avril*, 1847.

PREFACE TO THE THIRD EDITION.

SINCE the publication of the two former editions of the present Treatise, the Author has submitted to the public judgment another work connected with the same subject, and entitled "History of the Law of Nations in Europe and America, from the earliest times to the Treaty of Washington, 1842." In the present edition of the "Elements of International Law," constant reference has been had to this historical deduction, in which the Author endeavored to trace the origin and progress of those rules of international justice so long acknowledged to exist, and which have been more or less perfectly observed by the Christian nations of modern Europe; which have been adopted by their descendants in the New World, from the first planting of European colonies on the American Continents; and have been more recently applied to regulate the relations of the European and American nations with the Mohammedan and Pagan races of the other quarters of the globe.

The law of nations acknowledged by the ancient Greeks and Romans was exclusively founded on religion. The laws of peace and war, the inviolability of heralds and ambassadors, the right of asylum, and the obligation of treaties, were all consecrated by religious principles and rites. Ambassadors, heralds, and fugitives who took refuge in the temples, or on the household hearth, were deemed inviolable, because they were invested with a sacred character and the symbols of religion. Treaties were sanctioned with solemn oaths, the violation of which it was believed must be followed by the vengeance of the gods. War between nations of the same race and religion was declared

with sacred rites and ceremonies. The heralds proclaimed its existence by devoting the enemy to the infernal deities. "Eternal war against the Barbarians," was the Shibboleth of the most civilized and enlightened people of antiquity. Among the Romans "stranger" and "enemy" were synonymous. *Adversus hostem æterna auctoritas esto* was the maxim of the Twelve Tables, and Justinian considered all nations as enemies unless they were the allies of Rome. More permanent relations could exist only between nations of the same origin, and professing the religious faith common to the entire race. Such were the Hellenic tribes represented in the great Amphyctionic council of Greece, which was rather a religious than a political institution. But even the purest moralists hardly admitted any other duties between the Greeks themselves than such as were founded on positive compact.

The introduction of Christianity tended to abolish the Pagan precept: "Thou shalt hate thine enemy," and to substitute for it the benevolent command: "Love your enemies," which could not be reconciled with perpetual hostility between the different races of men. But this milder dispensation long struggled in vain against the secular enmity of the different nations of the ancient world, and that spirit of blind intolerance which darkened the ages succeeding the fall of the Roman empire. During the middle ages the Christian States of Europe began to unite, and to acknowledge the obligation of an international law common to all who professed the same religious faith. This law was founded mainly upon the following circumstances: —

First: The union of the Latin church under one spiritual head, whose authority was often invoked as the supreme arbiter between sovereigns and between nations. Under the auspices of Pope Gregory IX., the canon law was reduced into a code, which served as the rule to guide the decisions of the church in public as well as private controversies.

Second: The revival of the study of the Roman law, and the adoption of this system of jurisprudence by nearly all the

nations of Christendom, either as the basis of their municipal codes, or as subsidiary to the local legislation in each country.

The origin of the law of nations in modern Europe may thus be traced to these two principal sources,—the canon law and the Roman civil law. The proofs of this double origin may be distinctly discovered in the writings of the Spanish casuists and the professors of the celebrated University of Bologna. Each general council of the Catholic church was a European Congress, which not only deliberated on ecclesiastical affairs, but also decided the controversies between the different States of Christendom. The professors of the Roman law were the public jurists and diplomatic negotiators of the age. The writers on the law of nations before the time of Grotius, such as Francis de Victoria, Balthazar Ayala, Conrad Brunus, and Albericus Gentilis, fortified their reasonings by the authority of the Roman civilians and the canonists. The great religious revolution of the sixteenth century undermined one of the bases of this universal jurisprudence: but the public jurists of the Protestant school, whilst they renounced the authority of the Church of Rome and the canon law, still continued to appeal to the Roman civil law, as constituting the general code of civilized nations.

The establishment of the system of a balance of power among the European States also contributed to form the international law recognized by them. The idea of this system, though not wholly unknown to the statesmen of antiquity, had never been practically applied to secure the independence of nations against the ambition of the great military monarchies by which the civilized world was successively subdued. The modern system of the balance of power was first developed among the States of Italy during the latter part of the fifteenth century, and was applied, in the first instance, in order to maintain their mutual independence, and, subsequently, to unite them all against the invasions of the transalpine nations. Such was the policy of the Republic of Florence under Cosmo and

Lorenzo de Medici, and such was the object of Machiavelli in writing his celebrated treatise of the *Prince*. Unfortunately for his own fame, and for the permanent interests of mankind, this masterly writer, in his patriotic anxiety to secure his country against the dangers with which it was menaced from the *Barbarians*, did not hesitate to resort to those atrocious means already too familiar to the domestic tyrants of Italy. The violent remedies he sought to apply for her restoration to pristine greatness were poisons, and his book became the manual of despotism, in which Philip II., of Spain, and Catharine de Medici found their detestable maxims of policy. But policy can never be separated from justice with impunity. Sound policy can never authorize a resort to such measures as are prohibited by the law of nations, founded on the principles of eternal justice; and, on the other hand, the law of nations ought not to prohibit that which sound policy dictates as necessary to the security of any State. "Justice," says Burke, "is the great standing policy of civil society, and any eminent departure from it, under any circumstances, lies under the suspicion of being no policy at all."

Whatever may be thought of the long-disputed question as to the motives of Machiavelli in writing, his work certainly reflects the image of that dark and gloomy period of European society, presenting one mass of dissimulation, crime, and corruption, which called loudly for a great teacher and reformer to arise, who should stay the ravages of this moral pestilence, and speak the unambiguous language of truth and justice to princes and people. Such a teacher and reformer was Hugo Grotius, whose treatise on the *Laws of Peace and War*, produced a strong impression on the public mind of Christian Europe, and gradually wrought a most salutary change in the practical intercourse of nations in favor of humanity and justice. Whatever defects may be justly imputed to the works of Grotius, and the public jurists formed in his school, considered as scientific, expository treatises, it would be difficult to name any class of

writers which has contributed more to promote the progress of civilization than "these illustrious authors — these friends of human nature — these kind instructors of human errors and frailties — these benevolent spirits who held up the torch of science to a benighted world."[1] If the international intercourse of Europe, and the nations of European descent, has been since marked by superior humanity, justice, and liberality, in comparison with the usage of the other branches of the human family, this glorious superiority must be mainly attributed to these private teachers of justice, to whose moral authority Sovereigns and States are often compelled to bow, and whom they acknowledge as the ultimate arbiters of their controversies in peace; whilst the same authority contributes to give laws even to war itself, by limiting the range of its operations within the narrowest possible bounds consistent with its purposes and objects.

It has been observed by Sir James Mackintosh, that, without overrating the authority of this class of writers, or without considering authority in any case as a substitute for reason, the public jurists may justly be considered as entitled to great weight as impartial witnesses bearing testimony to the general sentiments and usages of civilized nations. Their testimony receives additional confirmation every time their authority is invoked by statesmen, and from the lapse of every successive year in which the current of this authority is uninterrupted by the avowal and practice of contrary principles and usages. Add to which, that their judgments are usually appealed to by the weak, and are seldom rejected except by those who are strong enough to disregard all the principles and rules of international morality. "The opinions of these eminent men," says Mr. Fox, "formed without prejudice upon subjects which they have carefully studied, under circumstances the most favorable to an impartial judgment, cannot but be considered as entitled to the highest respect. The maxims laid down by them are uninflu-

[1] Patrick Henry.

enced by national prejudices or particular interests; they reason upon great principles and with enlarged views of the welfare of nations; and by comparing the results of their own reflections with the lessons taught by the experience of preceding ages, they have established that system which they considered as of the greatest utility and of the most general application."[1]

The rules of international morality recognized by these writers are founded on the supposition, that the conduct which is observed by one nation towards another, in conformity with these rules, will be reciprocally observed by other nations towards it. The duties which are imposed by these rules are enforced by moral sanctions, by apprehension on the part of sovereigns and nations of incurring the hostility of other States, in case they should violate maxims generally received and respected by the civilized world. These maxims may, indeed, be violated by those who choose to suffer the consequences of that hostility; but they cannot be violated with impunity, nor without incurring general obloquy. The science which teaches the reciprocal duties of Sovereign States is not, therefore, a vain and useless study, as some have pretended. If it were so, the same thing might be affirmed of the science of private morality, the duties inculcated by which are frequently destitute of the sanction of positive law, and are enforced merely by conscience and social opinion. As the very existence of social intercourse in private life depends upon the observance of these duties, so the existence of that mutual intercourse among nations, which is so essential to their happiness and prosperity, depends upon the rules which have generally been adopted by the great society of nations to regulate that intercourse.

In preparing for the press the present edition of the Elements of International Law, the work has been subjected to a careful revision, and has been considerably augmented. The Author

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[1] Mackintosh, Hansard's Parl. Deb. vol. xxx. p. 894. Fox, Parl. Hist. of England, vol. xxx. p. 1260.

has endeavored to avail himself of the most recent questions which have occurred in the intercourse of States, the discussion and decision of which have contributed to throw new light upon that system of rules by which all civilized nations profess to be bound in their mutual intercourse. He has especially sought for those sources of information in the diplomatic correspondence and judicial decisions of our own country, which form a rich collection of instructive examples, arising out of the peculiar position of the United States during the wars of the French Revolution, and during the war declared by them against Great Britain, in 1812. That international law, common to all civilized and Christian nations, which our ancestors brought with them from Europe, and which was obligatory upon us whilst we continued to form a part of the British empire, did not cease to be so when we declared our independence of the parent country. Its obligation was acknowledged by the Continental Congress, in the ordinances published by that illustrious assembly for the regulation of maritime captures, and by the Court of Appeals, established for the adjudication of prize causes during the war of the revolution. In the meantime, the United States had recognized, in their treaty of alliance with France, those principles respecting the rights of neutral commerce and navigation which subsequently became the basis of the armed neutrality of the northern Powers of Europe. The American government has ever since constantly recognized and respected the same principles towards those maritime States by whom they are reciprocally recognized and respected. As to all others, it continues to observe the preëxisting rules of the ancient law of nations, whilst it has ever shown itself ready to adopt measures for mitigating the practices of war, and rendering them more conformable to the spirit of an enlightened age.

The Author has also endeavored to justify the confidence with which he has been so long honored by his country in the different diplomatic missions confided to him, by availing himself of

the peculiar opportunities, and the means of information thus afforded, for a closer examination of the different questions of public law which have occurred in the international intercourse of Europe and America, since the publication of the first edition of the present work. Among these questions are those relating to the exercise of the right of search for the suppression of the African slave-trade, and to the interference of the five great European Powers in the internal affairs of the Ottoman Empire. The former of these questions had already been discussed by the Author, in a separate treatise, published in 1841, in which the immunity of the national flag from every species and purpose of search, by the armed vessels of another State, in time of peace, except in virtue of a special compact, was maintained by an appeal to the oracles of public law both of Great Britain and the United States, and has since been solemnly sanctioned by the Treaty of Washington, 1842, and by the convention concluded, during the present year, between France and Great Britain, for the suppression of the mutual right of search conceded by former treaties. He indulges the hope that these additions to the work may be found to render it more useful to the reader, and make it more worthy of the favor with which the previous editions have been received.

BERLIN,
November, 1845.

ADVERTISEMENT TO THE FIRST EDITION.

THE object of the Author in the following attempt to collect the rules and principles which govern, or are supposed to govern, the conduct of States, in their mutual intercourse in peace and in war, and which have therefore received the name of International Law, has been to compile an elementary work for the use of persons engaged in diplomatic and other forms of public life, rather than for mere technical lawyers, although he ventures to hope that it may not be found entirely useless even to the latter. The great body of the rules and principles which compose this law is commonly deduced from examples of what has occurred or been decided, in the practice and intercourse of nations. These examples have been greatly multiplied in number and interest during the long period which has elapsed since the publication of Vattel's highly appreciated work; a portion of human history abounding in fearful transgressions of that law of nations which is supposed to be founded on the higher sanction of the natural law, (more properly called the law of God,) and at the same time rich in instructive discussions in cabinets, courts of justice, and legislative assemblies, respecting the nature and extent of the obligations between independent societies of men called States. The principal aim of the Author has been to glean from these sources the general principles which may fairly be considered to have received the assent of most civilized and Christian nations, if not as invariable rules of conduct, at least as rules which they cannot disregard without general obloquy and the hazard of provoking the hostility of

other communities who may be injured by their violation. Experience shows that these motives, even in the worst times, do really afford a considerable security for the observance of justice between States, if they do not furnish that perfect sanction annexed by the lawgiver to the observance of the municipal code of any particular State. The knowledge of this science has, consequently, been justly regarded as of the highest importance to all who take an interest in political affairs. The Author cherishes the hope that the following attempt to illustrate it will be received with indulgence, if not with favor, by those who know the difficulties of the undertaking.

BERLIN,
January 1, 1836.

PART FIRST.

DEFINITION, SOURCES, AND SUBJECTS OF INTERNATIONAL LAW.

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CHAPTER I.

DEFINITION AND SOURCES OF INTERNATIONAL LAW.

§ 1. Origin of International Law.

THERE is no legislative or judicial authority, recognized by all nations, which determines the law that regulates the reciprocal relations of States. The origin of this law must be sought in the principles of justice, applicable to those relations. While in every civil society or state there is always a legislative power which establishes, by express declaration, the civil law of that State, and a judicial power, which interprets that law, and applies it to individual cases, in the great society of nations there is no legislative power, and consequently there are no express laws, except those which result from the conventions which States may make with one another. As nations acknowledge no superior, as they have not organized any common paramount authority, for the purpose of establishing by an express declaration their international law, and as they have not constituted any sort of Amphictyonic magistracy to interpret and apply that law, it is impossible that there should be a code of international law illustrated by judicial interpretations.

The inquiry must then be, what are the principles of justice which ought to regulate the mutual relations of nations, that is to say, from what authority is international law derived?

When the question is thus stated, every publicist will decide it according to his own views, and hence the fundamental differences which we remark in their writings.

§ 2. Natural Law defined.

The leading object of Grotius, and of his immediate disciples and successors, in the science of which he was the founder, seems to have been, *First*, to lay down those rules of justice which would be binding on men living in a social state, independently of any positive laws of human institution; or, as is commonly expressed, living together in *a state of nature;* and,

Secondly, To apply those rules, under the name of Natural Law, to the mutual relations of separate communities living in a similar state with respect to each other.

With a view to the first of these objects, *Grotius* sets out in his work, on the rights of war and peace, (*de jure belli ac pacis*,) with refuting the doctrine of those ancient sophists who wholly denied the reality of moral distinctions, and that of some modern theologians, who asserted that these distinctions are created entirely by the arbitrary and revealed will of God, in the same manner as certain political writers (such as Hobbes) afterwards referred them to the positive institution of the civil magistrate. For this purpose, Grotius labors to show that there is a law audible in the voice of conscience, enjoining some actions, and forbidding others, according to their respective suitableness or repugnance to the reasonable and social nature of man. "Natural law," says he, "is the dictate of right reason, pronouncing that there is in some actions a moral obligation, and in other actions a moral deformity, arising from their respective suitableness or repugnance to the rational and social nature, and that, consequently, such actions are either forbidden or enjoined by God, the Author of nature. Actions which are the subject of this exertion of reason, are in themselves lawful or unlawful, and are, therefore, as such necessarily commanded or prohibited by God."[1]

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[1] "Jus naturale est dictatum rectæ rationis, indicans actui alicui, ex ejus convenientiâ aut disconvenientiâ cum ipsâ naturâ rationali, inesse moralem turpitudinem, aut necessitatem moralem, ac consequenter ab auctore naturæ, Deo, talem actum aut vetari aut præcipi.

"Actus de quibus tale extat dictatum, debiti sunt aut illiciti per se, atque ideo à Deo necessario præcepti aut vetiti intelliguntur." Grotius, de Jur. Bel. ac Pac. lib. i. cap. 1, § x. 1, 2.

§ 3. Natural Law identical with the law of God, or Divine Law.

The term Natural Law is here evidently used for those rules of justice which ought to govern the conduct of men, as moral and accountable beings, living in a social state, independently of positive human institutions, (or, as is commonly expressed, living in a state of nature,) and which may more properly be called the law of God, or the divine law, being the rule of conduct prescribed by Him to his rational creatures, and revealed by the light of reason, or the sacred Scriptures.

Natural Law applied to the intercourse of States.

As independent communities acknowledge no common superior, they may be considered as living in a state of nature with respect to each other: and the obvious inference drawn by the disciples and successors of Grotius was, that the disputes arising among these independent communities must be determined by what they call the Law of Nature. This gave rise to a new and separate branch of the science, called the Law of Nations, *Jus Gentium.*

§ 4. Law of Nations distinguished from Natural Law, by Grotius.

Grotius distinguished the law of nations from the natural law by the different nature of its origin and obligation, which he attributed to the general consent of nations. In the introduction to his great work, he says, "I have used in favor of this law, the testimony of philosophers, historians, poets, and even of orators; not that they are indiscriminately to be relied on as impartial authority; since they often bend to the prejudices of their respective sects, the nature of their argument, or the interest of their cause; but because where many minds of different ages and countries concur in the same sentiment, it must be referred to some general cause. In the subject now in question, this cause must be either a just deduction from the principles of natural justice, or universal consent. The first discovers to us the natural law, the second the law of nations. In order to distinguish these two branches of the same science, we must consider, not merely the terms which authors have used to define them, (for they often confound the terms *natural law* and *law of nations*,) but the nature of the subject in question. For if a certain maxim which cannot be fairly inferred from admitted principles is, nevertheless, found to be everywhere observed, there is reason to conclude that it derives its origin

from positive institution." He had previously said, "As the laws of each particular State are designed to promote its advantage, the consent of all, or at least the greater number of States, may have produced certain laws between them. And, in fact, it appears that such laws have been established, tending to promote the utility, not of any particular State, but of the great body of these communities. This is what is termed the Law of Nations, when it is distinguished from Natural Law."[1]

All the reasonings of Grotius rest on the distinction, which he makes between the natural and the positive or voluntary Law of Nations. He derives the first element of the Law of Nations from a supposed condition of society, where men live together in what has been called a state of nature. That natural society has no other superior but God, no other code than the divine law engraved in the heart of man, and announced by the voice of conscience. Nations living together in such a state of mutual independence must necessarily be governed by this same law. Grotius, in demonstrating the accuracy of his somewhat obscure definition of Natural Law, has given proof of a vast erudition, as well as put us in possession of all the sources of his knowledge. He then bases the positive or voluntary Law of Nations on the consent of all nations, or of the greater part of them, to observe certain rules of conduct in their reciprocal relations. He has

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[1] "Usus sum etiam ad juris hujus probationem testimoniis philosophorum, historicorum, poëtarum, postremò et oratorum; non quod illis indiscretè credendum sit; solent enim sectæ, argumento, causæ servire: sed quòd ubi multi diversis temporibus ac locis idem pro certo affirmant, id ad causam universalem referri debeat; quæ in nostris quæstionibus alia esse non potest quàm aut recta illatio ex naturæ principiis procedens, aut communis aliquis consensus. Illa jus naturæ indicat, hic jus gentium: quorum discrimen non quidem ex ipsis testimoniis, (passim enim scriptores voce *juris naturæ*, et *gentium* permiscent,) sed ex materiæ qualitate intelligendum est. Quod enim ex certis principiis certâ argumentatione deduci non potest, et tamen ubique observatum apparet, sequitur ut ex voluntate liberâ ortum habeat." * * * * * "Sed sicut cujusque civitatis jura utilitatem suæ civitatis respiciunt, ita inter civitates aut omnes aut plerasque ex consensu jura quædam nasci potuerunt; et nata apparent, quæ utilitatem respicerent non cœtuum singulorum sed magnæ illius universitatis. Et hoc jus est quod gentium dicitur, quoties id nomen à jure naturali distinguimus." Grotius, de Jur. Bel. ac Pac. Prolegom. 40, 17.

endeavored to demonstrate the existence of these rules by invoking the same authorities, as in the case of his definition of Natural Law. We thus see on what fictions or hypotheses Grotius has founded the whole Law of Nations. But it is evident that his supposed state of nature has never existed. As to the general consent of nations of which he speaks, it can at most be considered a tacit consent, like the *jus non scriptum quod consensus facit* of the Roman jurisconsults. This consent can only be established by the disposition, more or less uniform, of nations to observe among themselves the rules of international justice, recognized by the publicists. Grotius would, undoubtedly, have done better had he sought the origin of the Natural Law of Nations in the principle of utility, vaguely indicated by Leibnitz,[1] but clearly expressed and adopted by Cumberland,[2] and admitted by almost all subsequent writers, as the test of international morality.[3] But in the time that Grotius wrote, this principle which has so greatly contributed to dispel the mist with which the foundations of the science of International Law were obscured, was but very little understood. The principles and details of international morality, as distinguished from international law, are to be obtained not by applying to nations, the rules which ought to govern the conduct of individuals, but by ascertaining what are the rules of international conduct which, on the whole, best promote the general happiness of mankind. The means of this inquiry are observation and meditation; the one furnishing us with facts, the other enabling us to discover the connection of these facts as causes and effects, and to predict the results which will follow, whenever similar causes are again put into operation.[4]

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[1] Et jus quidem merum sive strictum nascitur ex principio servandæ pacis; æquitas sive caritas ad majus aliquid contendit, ut dum quisque alteri prodest quantum potest, felicitatem suam augeat in aliena; et ut verbo dicam, jus strictum miseriam vitat, jus superius ad felicitatem tendit, sed qualis in hanc mortalitatem cadit. Leibnitz, de Usu Actorum Publicorum, § 13.

[2] Lex naturæ est propositio naturaliter cognita, actiones indicans effectrices communis boni. Cumberland, de Legibus Naturæ, cap. v. § 1.

[3] Bentham's Principles of International Law. Works, Part VIII. p. 537. Edit. Bowring.

[4] Senior, Edinburgh Review, No. 156, p. 310, 321.

§ 5. Law of Nature and Law of Nations asserted to be identical, by Hobbes and Puffendorf.

Neither Hobbes nor Puffendorf entertains the same opinion as Grotius upon the origin and obligatory force of the positive Law of Nations. The former, in his work, *De Cive*, says, "The natural law may be divided into the natural law of men, and the natural law of States, commonly called the Law of Nations. The precepts of both are the same; but since States, when they are once instituted, assume the personal qualities of individual men, that law, which when speaking of individual men we call the Law of Nature, is called the Law of Nations when applied to whole States, nations, or people."[1] To this opinion *Puffendorf* implicitly subscribes, declaring that "there is no other voluntary or positive law of nations properly invested with a true and legal force, and binding as the command of a superior power."[2]

After thus denying that there is any positive or voluntary law of nations founded on the consent of nations, and distinguished from the natural law of nations, Puffendorf proceeds to qualify this opinion by admitting that the usages and comity of civilized nations have introduced certain rules, for mitigating the exercise of hostilities between them; that these rules are founded upon a general tacit consent; and that their obligation ceases by the express declaration of any party, engaged *in a just war*, that it will no longer be bound by them. There can be no doubt that any belligerent nation which chooses to withdraw itself from the obligation of the Law of Nations, in respect to the manner of carrying on war against another State, *may* do so at the risk of incurring the penalty of vindictive retaliation on the part of other nations, and of putting itself in general hostility with the civilized world. As a celebrated English civilian and magistrate (Lord Stowell) has well observed, "a great part of the law of nations stands upon the usage and practice of nations. It is introduced,

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[1] Præcepta utriusque eadem sunt; sed quia civitates semel institutæ inducunt proprietates hominum personales, lex quam, loquentes de hominum singulorum officio, naturalem dicimus, applicata totis civitatibus, nationibus sive gentibus, vocatur jus gentium. Hobbes, De Cive, cap. xiv. § 4.

[2] Cui sententiæ et nos plane subscribimus. Nec præterea aliud jus gentium, voluntarium seu positivum dari arbitramus, quod quidem legis propriæ dictæ vim habeat, quæ gentes tamquam sa superiore profecta stringat. Puffendorf, De Jure Naturæ et Gentium, lib. ii. cap. 3, § 23.

indeed, by general principles, but it travels with those general principles only to a certain extent; and if it stops there, you are not at liberty to go further, and say that mere general speculations would bear you out in a further progress; thus, for instance, on mere general principles, it is lawful to destroy your enemy; and mere general principles make no great difference as to the manner by which this is to be effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and allows some, and prohibits other modes of destruction; and a belligerent is bound to confine himself to those modes which the common practice of mankind has employed, and to relinquish those which the same practice has not brought within the ordinary exercise of war, however sanctioned by its principles and purposes."[1]

The same remark may be made as to what Puffendorf says respecting the privileges of ambassadors, which Grotius supposes to depend upon the voluntary law of nations; whilst Puffendorf says they depend, either upon natural law which gives to public ministers a sacred and inviolable character, or upon tacit consent, as evidenced in the usage of nations, conferring upon them certain privileges which may be withheld at the pleasure of the State where they reside. The distinction here made between those privileges of ambassadors, which depend upon natural law, and those which depend upon custom and usage, is wholly groundless; since both one and the other may be disregarded by any State which chooses to incur the risk of retaliation or hostility, these being the only sanctions by which the duties of international law can be enforced.

Still it is not the less true that the law of nations, founded upon usage, considers an ambassador, duly received in another State, as exempt from the local jurisdiction by the consent of that State, which consent cannot be withdrawn without incurring the risk of retaliation, or of provoking hostilities on the part of the sovereign by whom he is delegated. The same thing may be affirmed of all the usages which constitute the Law of Nations. They may be disregarded by those who choose to declare themselves absolved from the obligation of that law, and

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[1] Robinson's Admiralty Rep. vol. i. p. 140.

to incur the risk of retaliation from the party specially injured by its violation, or of the general hostility of mankind.[1]

§ 6. Law of Nations derived from reason and usage.

Bynkershoek, (who wrote after Puffendorf, and before Wolf and Vattel,) derives the law of nations from reason and usage (*ex ratione et usu*,) and founds usage on the evidence of treaties and ordinances (*pacta et edicta*,) with the comparison of examples frequently recurring. In treating of the rights of neutral navigation in time of war, he says, "Reason commands me to be equally friendly to two of my friends who are enemies to each other; and hence it follows that I am not to prefer either in war. Usage is shown by the constant, and, as it were, perpetual custom which sovereigns have observed of making treaties and ordinances upon this subject, for they have often made such regulations by treaties to be carried into effect in case of war, and by laws enacted after the commencement of hostilities. I have said *by, as it were, a perpetual custom;* because one, or perhaps two treaties, which vary from the general usage, do not alter the law of nations."[2]

In treating of the question as to the competent judicature in cases affecting ambassadors, he says, "The ancient jurisconsults assert, that the law of nations is that which is observed in accordance with the light of reason, between nations, if not among all, at least certainly among the greater part, and those the most civilized. According to my opinion, we may safely follow this definition, which establishes two distinct bases of this law; namely, reason and custom. But in whatever manner we may define the law of nations, and however we may argue upon it, we must come at last to this conclusion, that what reason dictates to nations, and what nations observe between each other,

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[1] Wheaton's History of the Law of Nations, p. 96.

[2] "Jus Gentium commune in hanc rem non aliunde licet discere, quàm ex ratione et usu. Ratio jubet ut duobus, invicem hostibus, sed mihi amicis, æque amicus sim; et inde efficitur, ne in causâ belli alterum alteri præferam. Usus intelligitur ex perpetuâ quodammodo paciscendi edicendique consuetudine; pactis enim Principes sæpe id egerunt in casu belli, sæpe etiam edictis contra quoscunque, flagrante jam bello. Dixi, *ex perpetuâ quodammodo consuetudine*, quia unum fortè alterumve pactum, quod a consuetudine recedit, Jus Gentium non mutat." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 10.

as a consequence of the collation of cases frequently recurring, is the only law of those who are not governed by any other — (*unicum jus sit eorum, qui alio jure non reguntur.*) If all men are men, that is to say, if they make use of their reason, it must counsel and command them certain things which they ought to observe as if by mutual consent, and which being afterwards established by usage, impose upon nations a reciprocal obligation ; without which law, we can neither conceive of war, nor peace, nor alliances, nor embassies, nor commerce."[1] Again, he says, treating the same question: "The Roman and pontifical law can hardly furnish a light to guide our steps; the entire question must be determined by reason and the usage of nations. I have alleged whatever reason can adduce for or against the question; but we must now see what usage has approved, for that must prevail, since the law of nations is thence derived."[2] In a subsequent passage of the same treatise, he says, "It is nevertheless most true, that the States General of Holland alleged, in 1651, that, according to the law of nations, an ambassador cannot be arrested, though guilty of a criminal offence; and equity requires that we should observe that rule, unless we have previously renounced it. The law of nations is only a presumption founded upon usage, and every such presumption ceases the moment the will of the party who is affected by it is expressed to the contrary. Huberus asserts that ambassadors cannot acquire or preserve their rights by prescription; but he confines this to the case of subjects who seek an asylum in the house of a foreign minister, against the will of their own sovereign. I hold the rule to be general as to every privilege of ambassadors, and that there is no one they can pretend to enjoy against the express declaration of the sovereign, because an express dissent excludes the supposition of a tacit consent, and there is no law of nations except between those who voluntarily submit to it by tacit convention."[3]

§ 7. System of Wolf.

The public jurists of the school of Puffendorf had considered the science of international law as a branch of

[1] De Foro Legatorum, cap. iii. § 10.
[2] De Foro Legatorum, cap. vii. § 8.
[3] Ibid. cap. xix. § 6.

the science of ethics. They had considered it as the natural law of individuals applied to regulate the conduct of independent societies of men, called States. To Wolf belongs, according to Vattel, the credit of separating the law of nations from that part of natural jurisprudence which treats of the duties of individuals.

In the preface of his great work, he says, "That since such is the condition of mankind that the strict law of nature cannot always be applied to the government of a particular community, but it becomes necessary to resort to laws of positive institution more or less varying from the natural law, so in the great society of nations it becomes necessary to establish a law of positive institution more or less varying from the natural law of nations. As the common welfare of nations requires this mutation, they are not less bound to submit to the law which flows from it than they are bound to submit to the natural law itself, and the new law thus introduced, so far as it does not conflict with the natural law, ought to be considered as the common law of all nations. This law we have deemed proper to term, with Grotius, though in a somewhat stricter sense, the voluntary Law of Nations." [1]

Wolf afterwards says, that "the voluntary law of nations derives its force from the presumed consent of nations, the conventional from their express consent; and the consuetudinary from their tacit consent." [2]

This presumed consent of nations (*consentium gentium præsumptum*) to the voluntary law of nations he derives from the fiction of a great commonwealth of nations (*civitate gentium maxima*) instituted by nature herself, and of which all the nations of the world are members. As each separate society of men is governed by its peculiar laws freely adopted by itself, so is the general society of nations governed by its appropriate laws freely adopted by the several members, on their entering the same. These laws he deduces from a modification of the natural law, so as to adapt it to the peculiar nature of that social union, which, according to him, makes it the duty of all nations to submit to the rules by which that union is governed, in the same

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[1] Wolfius, Jus Gentium, Pref. § 3.

[2] Wolfius, Proleg. § 25.

manner as individuals are bound to submit to the laws of the particular community of which they are members. But he takes no pains to prove the existence of any such social union or universal republic of nations, or to show when and how all the human race became members of this union or citizens of this republic.

§ 8. Differences of opinion between Grotius and Wolf on the origin of the voluntary Law of Nations.

Wolf differs from Grotius, as to the origin of the voluntary law of nations, in two particulars:

1. Grotius considers it as a law of positive institution, and rests its obligation upon the general consent of nations, as evidenced in their practice. Wolf, on the other hand, considers it as a law which nature has imposed upon all mankind as a necessary consequence of their social union; and to which no one nation is at liberty to refuse its assent.

2. Grotius confounds the voluntary law of nations with the customary law of nations. Wolf maintains that it differs in this respect, that the voluntary law of nations is of universal obligation, whilst the customary law of nations merely prevails between particular nations, among whom it has been established from long usage and tacit consent.

§ 9. System of Vattel.

It is from the work of Wolf that Vattel has drawn the materials of his treatise on the law of nations.. He, however, differs from that publicist in the manner of establishing the foundations of the voluntary law of nations. Wolf deduces the obligations of this law, as we have already seen, from the fiction of a great republic instituted by nature herself, and of which all the nations of the world are members. According to him the voluntary law of nations is, as it were, the civil law of that great republic. This idea does not satisfy Vattel. "I do not find," says he, "the fiction of such a republic either very just or sufficiently solid, to deduce from it the rules of a universal law of nations, necessarily admitted among sovereign States. I do not recognize any other natural society between nations than that which nature has established between all men. It is the essence of all civil society, (*civitatis*,) that each member thereof should have given up a part of his rights to the body of the society, and that there should exist a supreme authority capable

of commanding all the members, of giving to them laws, and of punishing those who refuse to obey, Nothing like this can be conceived or supposed to exist between nations. Each sovereign State pretends to be, and in fact is, independent of all others. Even according to Mr. Wolf, they must all be considered as so many free individuals, who live together in a state of nature, and acknowledge no other law than that of nature itself, and its Divine Aut or.[1]

According to Vattel, the Law of Nations, in its origin, is nothing but *the law of nature applied to nations.*

Having laid down this axiom, he qualifies it in the same manner, and almost in the identical terms of Wolf, by stating that the nature of the subject to which it is applied being different, the law which regulates the conduct of individuals must necessarily be modified in its application to the collective societies of men called nations or states. A state is a very different subject from a human individual, from whence it results that the obligations and rights, in the two cases, are very different. The same general rule, applied to two subjects, cannot produce the same decisions, when the subjects themselves differ. There are, consequently, many cases in which the natural law does not furnish the same rule of decision between state and state as would be applicable between individual and individual. It is the art of accommodating this application to the different nature of the subjects in a just manner, according to right reason, which constitutes the law of nations a particular science.

This application of the natural law, to regulate the conduct of nations in their intercourse with each other, constitutes what both Wolf and Vattel term the *necessary law of nations.* It is *necessary*, because nations are absolutely bound to observe it. The precepts of the natural law are equally binding upon states as upon individuals, since states are composed of men, and since the natural law binds all men, in whatever relation they may stand to each other. This is the law which Grotius and his followers call the *internal law of nations*, as it is obligatory upon nations in point of conscience. Others term it the *natural law of nations.* This law is immutable, as it consists in the applica-

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[1] Vattel, Droit des Gens, Préface.

tion to States of the natural law, which is itself immutable, because founded on the nature of things, and especially on the nature of man.

This law being immutable, and the law which it imposes necessary and indispensable, nations can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it.[1]

Vattel has himself anticipated one objection to his doctrine that States cannot change the necessary law of nations by their conventions with each other. This objection is, that it would be inconsistent with the liberty and independence of a nation to allow to others the right of determining whether its conduct was or was not conformable to the necessary law of nations. He obviates the objection by a distinction which pronounces treaties made in contravention of the necessary law of nations, to be invalid, according to the *internal* law, or that of conscience, at the same time that they may be valid by the *external* law; States being often obliged to acquiesce in such deviations from the former law in cases where they do not affect their perfect rights.[2]

From this distinction of Vattel, flows what Wolf had denominated the voluntary law of nations, (*jus gentium voluntarium*,) to which term his disciple assents, although he differs from Wolf as to the manner of establishing its obligation. He however agrees with Wolf in considering the voluntary law of nations as a positive law, derived from the presumed or tacit consent of nations to consider each other as perfectly free, independent, and equal, each being the judge of its own actions, and responsible to no superior but the Supreme Ruler of the universe.

Besides this voluntary law of nations, these writers enumerate two other species of international law. These are:

1. The conventional law of nations, resulting from compacts between particular States. As a treaty binds only the contracting parties, it is evident that the conventional law of nations is not a universal, but a particular law.

2. The customary law of nations, resulting from usage between particular nations. This law is not universal, but binding upon those States only which have given their tacit consent to it.

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[1] Droit des Gens, Préliminaires, §§ vi. vii. viii. ix.

[2] Droit des Gens, Préliminaires, § ix.

Vattel concludes that these three species of international law, the *voluntary*, the *conventional*, and the *customary* compose together the *positive law of nations*. They proceed from the will of nations; or (in the words of Wolf) "the *voluntary*, from their presumed consent; the *conventional*, from their express consent; and the *customary*, from their tacit consent." [1]

It is almost superfluous to point out the confusion in this enumeration of the different species of international law, which might easily have been avoided by reserving the expression, "voluntary law of nations," to designate the *genus*, including all the rules introduced by positive consent, for the regulation of international conduct, and divided into the two *species* of conventional law and customary law, the former being introduced by treaty, and the latter by usage; the former by express consent, and the latter by tacit consent between nations.[2]

§ 10. System of Hefftter.

According to *Heffter*, one of the most recent and distinguished public jurists of Germany, "the law of nations, *jus gentium*, in its most ancient and most extensive acceptation, as established by the Roman jurisprudence, is a law (*Recht*) founded upon the general usage and tacit consent of nations. This law is applied, not merely to regulate the mutual relations of States, but also of individuals, so far as concerns their respective rights and duties, having everywhere the same character and the same effect, and the origin and peculiar form of which are not derived from the positive institutions of any particular State." According to this writer, the *jus gentium* consists of two distinct branches:

1. Human rights in general, and those private relations which Sovereign States recognize in respect to individuals not subject to their authority.

2. The direct relations existing between those States themselves.

"In the modern world, this latter branch has exclusively received the denomination of law of nations, *Völkerrecht*, *Droit des Gens*, *Jus Gentium*. It may more properly be called external public law, to distinguish it from the internal public law of a

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[1] Droit des Gens, Préliminaries, § xxvii.; Wolf, Proleg. xxv.

[2] Vattel, Droit des Gens, edit. de Pinheiro Ferreira, tom. iii. p. 22.

particular State. The first part of the ancient *jus gentium* has become confounded with the municipal law of each particular nation, without at the same time losing its original and essential character. This part of the science concerns, exclusively, certain rights of men in general, and those private relations which are considered as being under the protection of nations. It has been usually treated of under the denomination of *private international law*."

Heffter does not admit the term international law (*droit international*) lately introduced and generally adopted by the most recent writers. According to him this term does not sufficiently express the idea of the *jus gentium* of the Roman jurisconsults. He considers the law of nations as a law common to all mankind, and which no people can refuse to acknowledge, and the protection of which may be claimed by all men and by all States. He places the foundation of this law on the incontestable principle that wherever there is a society, there must be a law obligatory on all its members; and he thence deduces the consequence that there must likewise be for the great society of nations an analogous law.

"Law in general (*Recht im Allgemeinen*) is the external freedom of the moral person. This law may be sanctioned and guaranteed by a superior authority, or it may derive its force from self-protection. The *jus gentium* is of the latter description. A nation associating itself with the general society of nations, thereby recognizes a law common to all nations by which its international relations are to be regulated. It cannot violate this law, without exposing itself to the danger of incurring the enmity of other nations, and without exposing to hazard its own existence. The motive which induces each particular nation to observe this law depends upon its persuasion that other nations will observe towards it the same law. The *jus gentium* is founded upon reciprocity of will. It has neither lawgiver nor supreme judge, since independent States acknowledge no superior human authority. Its organ and regulator is public opinion: its supreme tribunal is history, which forms at once the rampart of justice and the Nemesis by whom injustice is avenged. Its sanction, or the obligation of all men to respect it, results from the moral order of the universe, which will not suffer nations and individuals to be isolated from each other, but

constantly tends to unite the whole family of mankind in one great harmonious society."[1]

There is no universal law of nations.

Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin. This distinction between the European law of nations and that of the other races of mankind has long been remarked by the publicists. *Grotius* states that the *jus gentium* acquires its obligatory force from the positive consent of all nations, or *at least of several.* "I say of several, for except the natural law, which is also called the *jus gentium*, there is no other law which is common to all nations. It often happens, too, that what is the law of nations in one part of the world is not so in another, as we shall show in the proper place."[2] So also *Bynkershoek*, in the passage before cited, says that "the law of nations is that which is observed, in accordance with the light of reason, between nations, if not among all, *at least certainly among the greater part, and those the most civilized.*"[3] *Leibnitz* speaks of the voluntary law as established by the tacit consent of nations. "Not," says he, "that it

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[1] Heffter, Das Europäische Völkerrecht, § 2.

The learned Jesuit Saurez has anticipated this view of the moral obligation of the *jus gentium*. "Ratio hujus juris est, quia humanum genus, quamvis in varios populos et regna divisum, semper habeat aliquam unitatem, non solum specificam, sed etiam quasi politicam et moralem, quam indicat naturale præceptum mutui amoris et misericordiæ, quod ad omnes extenditur, etiam extraneos et cujuscunque nationis. Quapropter, licet unaquaque civitas perfecta, res-publica, aut regnum, sit in se communitas perfecta et suis membris constans, nihilominus quælibet illarum etiam membrum aliquo modo hujus universi prout genus humanum spectat. Numquam enim illæ communitates adeo sunt sibi sufficientes sigillatim, quin indigeant aliquo mutuo juvamine, et societate, ac communicatione, interdum ad melius esse majoremque utilitatem, interdum vero et ob moralem necessitatem. Hâc ergo ratione indigent aliquo jure, quo dirigantur et recte ordinentur in hoc genere communicationis et societatis. Et quamvis magnâ ex parte hoc fiat per rationem naturalem, non tamen sufficienter et immediatè quoad omnia: ideoque potuerunt usu earundem gentium introduci." Saurez, de Legibus et Deo Legislatore, lib. ii. cap. xix. n. g.

[2] De Jur. Bel. ac Pac. lib. i. cap. 1, § xiv. 4.

[3] Bynkershoek, De Foro Legatorum, Vid. supra.

is necessarily the law of all nations and of all times, since the Europeans and the Indians frequently differ from each other concerning the ideas which they have formed of international law, and even among us it may be changed by the lapse of time, of which there are numerous examples. The basis of international law is natural law, which has been modified according to times and local circumstances."[1] *Montesquieu*, in his *Esprit des Lois*, says, that "every nation has a law of nations — even the Iroquois, who eat their prisoners, have one. They send and receive ambassadors; they know the laws of war and peace; the evil is, that their law of nations is not founded upon true principles."[2]

There is then, according to these writers, no universal law of nations, such as Cicero describes in his treatise *De Republica*, binding upon the whole human race — which all mankind in all ages and countries, ancient and modern, savage and civilized, Christian and Pagan, have recognized in theory or in practice, have professed to obey, or have in fact obeyed.

An eminent French writer on the science of which we propose to treat, has questioned the propriety of using the term *droit des gens* (law of nations) as applicable to those rules of conduct which obtain between independent societies of men. He asserts "that there can be no *droit* (right) where there is no *loi* (law); and there is no law where there is no superior: without law, obligations, properly so called, cannot exist; there is only a moral obligation resulting from natural reason; such is the case between nation and nation. The word *gens* imitated from the Latin, does not signify in the French language either people or nations."[3]

The same writer has made it the subject of serious reproach to the English language that it applies the term *law* to that system of rules which governs, or ought to govern, the conduct of nations in their mutual intercourse. His argument is, that law is a rule of conduct, deriving its obligation from sovereign authority, and

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[1] Leibnitz, Cod. Jur. Gent. diplom. Préf.

[2] Esprit des Lois, liv. i. ch. 3.

[3] Rayneval, Institutions du droit de la nature et des gens, Note 10 du 1r liv. p. viii.

binding only on those persons who are subject to that authority; — that nations, being independent of each other, acknowledge no common sovereign from whom they can receive the law; — that all the relative duties between nations result from *right* and *wrong*, from convention and usage, to neither of which can the term *law* be properly applied; — that this system of rules had been called by the Roman lawyers the *jus gentium*, and in all the languages of modern Europe, except the English language, the *right of nations*, or the laws of war and peace.[1]

That very distinguished legal reformer, Jeremy Bentham, had previously expressed the same doubt how far the rules of conduct which obtain between nations can with strict propriety be called *laws*.[2] And one of his disciples has justly observed, that "*laws*, properly so called, are commands proceeding from a determinate rational being, or a determinate body of rational beings, to which is annexed an eventual evil as the sanction. Such is the law of nature, more properly called the law of God, or the divine law; and such are political human laws, prescribed by political superiors to persons in a state of subjection to their authority. But laws imposed by general opinion are styled *laws* by an analogical extension of the term. Such are the laws of honor imposed by opinions current in the fashionable world, and enforced by appropriate sanction. Such, also, are the laws which regulate the conduct of independent political societies in their mutual relations, and which are called the law of nations, or international law. This law obtaining between nations is not positive law; for every positive law is prescribed by a given superior or sovereign to a person or persons in a state of subjection to its author. The rule concerning the conduct of sovereign States, considered as related to each other, is termed *law* by its analogy to positive law, being imposed upon nations or sovereigns, not by the positive command of a superior authority, but by opinions generally current among nations. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking

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[1] Droit des gens, *Fr.* Dritto delli genti, *Ital.* Direito das Gentes, *Portug.* Völkerrecht, *Germ.* Volkenregt, *Dutch.* Folkeret, *Dan.* Folkrätt, *Swed.*

[2] Bentham, Morals and Legislation, vol. ii. p. 256. Ed. 1823.

general hostility, and incurring its probable evils, in case they should violate maxims generally received and respected."[1]

This law has commonly been called the *jus gentium* in the Latin, *droit des gens* in the French, and law of nations in the English language. It was more accurately termed the *jus inter gentes*, the law between or among nations, for the first time, by Dr. Zouch, an English civilian and writer on the science, distinguished in the celebrated controversy between the civil and common lawyers during the reign of Charles II., as to the extent of the Admiralty jurisdiction. He introduced this term as more appropriate to express the real scope and object of this law.[2] An equivalent term in the French language was subsequently proposed by Chancellor D'Aguesseau, as better adapted to express the idea properly annexed to that system of jurisprudence commonly called *le droit des gens*, but which, according to him, ought properly to be termed *le droit entre les gens*.[3] The term *international* law has been since proposed by Mr. Bentham as well adapted to express in our language, "in a more significant manner that branch of jurisprudence, which commonly goes under the name of *law of nations*, a denomination so uncharacteristic, that were it not for the force of custom, it would rather seem to refer to internal or municipal jurisprudence."[4] The terms *international law* and *droit international* have now taken root in the English and French languages, and are constantly used in all discussions connected with the science, and we cannot agree with Heffter in proscribing them. (*a*)

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[1] Austin, Province of Jurisprudence determined, pp. 147, 207.

[2] Zouch, Juris et judicii fecialis, sive *juris inter gentes*. Lond. 1650.

[3] Œuvres de D'Aguesseau, tome ii. p. 337. Ed. 1773.

[4] Bentham, Morals and Legislation, vol. ii. p. 256.

(*a*) [M. Fœlix, who in other respects commends most highly this work, objects to the application of the term "international law," as it is used by Mr. Wheaton, to the principles which govern the reciprocal relations of States, established by usage or treaties, and which, as he contends, are only properly designated as the "law of nations," *droit des gens*. He appropriates *international law*, to indicate the collection of principles, which serve to determine the cases of conflict between the private or internal laws of different States, that is to say, to the branch of jurisprudence which constitutes the subject of Judge Story's *Conflict of Laws*, and of his own Treatise. "On appelle droit international l'ensemble des régles reconnues comme *raison de décider* des conflits entre le droit privé des diverses nations;

Opinion of Savigny.

According to Savigny, "there may exist between different nations the same community of ideas which contributes to form the positive unwritten law (*das positive Recht*) of a particular nation. This community of ideas, founded upon a common origin and religious faith, constitutes international law as we see it existing among the Christian States of Europe, a law which was not unknown to the people of antiquity, and which we find among the Romans under the name of *jus feciale*. International law may therefore be considered as a positive law, but as an imperfect positive law, (*eine unvollendete Rechtsbildung*,) both on account of the indeterminateness of its precepts, and because it lacks that solid basis on which rests the positive law of every particular nation, the political power of the State and a judicial authority competent to enforce the law. The progress of civilization, founded on Christianity, has gradually conducted us to observe a law analogous to this in our intercourse with all the nations of the globe, whatever may be their religious faith, and without reciprocity on their part." [1]

It may be remarked, in confirmation of this view, that the more recent intercourse between the Christian nations of Europe and America and the Mohammedan and Pagan nations of Asia and Africa indicates a disposition, on the part of the latter, to renounce their peculiar international usages and adopt those of Christendom. The rights of legation have been recognized by, and reciprocally extended to, Turkey, Persia, Egypt, and the

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en d'autres termes, le droit international se compose des régles relatives à l'application des lois civiles ou criminelles d'un état dans le territoire d'un état étranger." Fœlix, Du conflit des lois de differentes nations on du droit international, chap. 1, § 1, et note 1. Polsen, a late English writer, objects to the title *International Law*, as used in this treatise, as an unnecessary change from the former nomenclature. Polsen, Principles of the Law of Nations, p. 1. On the other hand, Mr. Manning says, that "the phrase *international law* is now in common currency, a definite and expressive term, of which Mr. Bentham claims the fatherhood, and which is almost the only term of his new political nomenclature that has passed into general circulation." Manning's Commentaries of the Law of Nations, p. 2. The term is, also, adopted by Hautefeuille, the author of one of the ablest treatises on the science that has appeared in France, and who thus defines it: "Le droit international est celui qui règle et régit les relations des peuples entre eux." Hautefeuille, Droits des nations neutres, tom. 1, p. 3.]

[1] Savigny, System des heutigen Römischen Rechts, 1 B'd, 1 Buch, Kap. ii. § 11.

States of Barbary. The independence and integrity of the Ottoman Empire have been long regarded as forming essential elements in the European balance of power, and, as such, have recently become the objects of conventional stipulations between the Christian States of Europe and that Empire, which may be considered as bringing it within the pale of the public law of the former.[1] (*b*)

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[1] Wheaton's Hist. Law of Nations, p. 583.

(*b*) [It was formerly held that in the intercourse between Christian and Mohammedan nations, the latter were entitled to a very relaxed application of the principles established by the States of Christendom to regulate their mutual relations. All recent negotiations, however, between the Sultan and Christian States have been conducted with reference to that law of nations, which is recognized by the civilized powers of Europe and America, and since 1826 reforms have been made in the internal government of Turkey, which have been supposed to afford to foreign nations a guarantee for her conventional engagements. Though the Turkish Empire was not represented at the Congress of Vienna, or at any subsequent congress convened for the purpose of considering the general interests of Europe, the Christian Powers have, for upwards of two centuries, had treaties of commerce with the Porte, and since 1791 they have repeatedly interposed to effect peace between Turkey and one of their number, especially Russia. In 1827, France, Great Britain, and Russia, joined in a treaty to compel the Sublime Porte to recognize the independence of Greece, while in 1840 the Western Powers interfered as well to save the Ottoman Empire from being dismembered by the aggressions of the Pacha of Egypt, as from surrendering its independence to the exclusive protectorate of Russia. At this time, (July, 1854,) a contest is going on in which England and France, with the avowed acquiescence of Austria and Prussia, are united, professedly, for the purpose of maintaining Turkey as an independent State, essential, as they allege, to the political equilibrium of Europe, against the Emperor of Russia, who not only asserts his claim, sanctioned by all recent treaties, to a protectorate in Moldavia, Wallachia, and Servia, which provinces enjoy special privileges, but contends for the right of intervention, as based on repeated conventions, going back to the treaty of Kutschouc-Kaynardgi, of 1774, (Martens — Recueil des Traités, t. ii. p. 297,) in behalf of his co-religionists of the Greek Church generally, constituting three fourths of the European subjects of the Porte. The influence that Austria, France, and England, as well as Russia, have at different times exercised, as respects even the strictly internal relations of the Sultan to his subjects, and in matters of municipal administration, as well as the peculiar provisions, by which jurisdiction is still recognized in the ministers and consuls of the Christian Powers over their citizens and subjects in the countries of the East, including the protection accorded by them to Franks, though not of their own nationality, renders it difficult to apply to the questions, which arise between Turkey and other Powers, the rules derived from the international relations of those States, which reject all interference from abroad in affairs of domestic cognizance.]

The same remark may be applied to the recent diplomatic transactions between the Chinese Empire and the Christian nations of Europe and America, in which the former has been compelled to abandon its inveterate anti-commercial and anti-social principles, and to acknowledge the independence and equality of other nations in the mutual intercourse of war and peace.

§ 11. Definition of international law.

International law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society, existing among independent nations; with such definitions and modifications as may be established by general consent.[1]

§ 12. Sources of international law.

The various sources of international law in these different branches are the following:—

1. Text writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.

Without wishing to exaggerate the importance of these writers, or to substitute, in any case, their authority for the principles of reason, it may be affirmed that they are generally impartial in their judgment. They are witnesses of the sentiments and usages of civilized nations, and the weight of their testimony increases every time that their authority is invoked by statesmen, and every year that passes without the rules laid down in their works being impugned by the avowal of contrary principles.

2. Treaties of peace, alliance, and commerce declaring, modifying, or defining the preëxisting international law.

What has been called the positive or practical law of nations may also be inferred from treaties; for though one or two treaties, varying from the general usage and custom of nations, cannot alter the international law, yet an almost perpetual succession of

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[1] Madison, Examination of the British Doctrine which subjects to Capture a Neutral Trade not open in Time of Peace, p. 41. London Ed. 1806.

treaties, establishing a particular rule, will go very far towards proving what that law is on a disputed point. Some of the most important modifications and improvements in the modern law of nations have thus originated in treaties.[1]

"Treaties," says Mr. Madison, "may be considered under several relations to the law of nations, according to the several questions to be decided by them."

"They may be considered as simply repeating or affirming the general law; they may be considered as making exceptions to the general law, which are to be a particular law between the parties themselves; they may be considered explanatory of the law of nations on points where its meaning is otherwise obscure or unsettled, in which they are, first, a law between the parties themselves, and next, a sanction to the general law, according to the reasonableness of the explanation, and the number and character of the parties to it; lastly, treaties may be considered a voluntary or positive law of nations."[2]

3. Ordinances of particular States, prescribing rules for the conduct of their commissioned cruisers and prize tribunals.

The marine ordinances of a State may be regarded, not only as historical evidences of its practice with regard to the rights of maritime war, but also as showing the views of its jurists with respect to the rules generally recognized as conformable to the universal law of nations. The usage of nations, which constitutes the law of nations, has not yet established an impartial tribunal for determining the validity of maritime captures. Each belligerent State refers the jurisdiction over such cases to the courts of admiralty established under its own authority within its own territory, with a final resort to a supreme appellate tribunal, under the direct control of the executive government. The rule by which the prize courts thus constituted are bound to proceed in adjudicating such cases, is not the municipal law of their own country, but the general law of nations, and the particular treaties by which their own country is bound to other States. They may be left to gather the general law of nations from its ordinary sources in the authority of institutional writers;

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[1] Bynkershoek, Quest. Jur. Pub. lib. i. cap. 10.

[2] Madison, Examination of the British Doctrine, &c. p. 39.

or they may be furnished with a positive rule by their own sovereign, in the form of ordinances, framed according to what their compilers understood to be the just principles of international law.

The theory of these ordinances is well explained by an eminent English civilian of our own times. "When," says Sir William Grant, "Louis XIV. published his famous ordinance of 1681, nobody thought that he was undertaking to legislate for Europe, merely because he collected together and reduced into the shape of an ordinance the principles of marine law as then understood and received in France. I say as understood in France, for although the law of nations ought to be the same in every country, yet as the tribunals which administer the law are wholly independent of each other, it is impossible that some differences shall not take place in the manner of interpreting and administering it in the different countries which acknowledge its authority. Whatever may have been since attempted it was not, at the period now referred to, supposed that one State could make or alter the law of nations, but it was judged convenient to establish certain principles of decision, partly for the purpose of giving a uniform rule to their own courts, and partly for the purpose of apprising neutrals what that rule was. The French courts have well and properly understood the effect of the ordinances of Louis XIV. They have not taken them as positive rules binding upon neutrals; but they refer to them as establishing legitimate presumptions, from which they are warranted to draw the conclusion, which it is necessary for them to arrive at, before they are entitled to pronounce a sentence of condemnation." [1]

4. The adjudications of international tribunals, such as boards of arbitration and courts of prize.

As between these two sources of international law, greater

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[1] Marshall on Insurance, vol. i. 425. The commentary of Valin upon the marine ordinance of Louis XIV., published in 1760, contains a most valuable body of maritime law, from which the English writers and judges, especially Lord Mansfield, have borrowed very freely, and which is often cited by Sir W. Scott (Lord Stowell) in his judgments in the High Court of Admiralty. Valin also published, in 1763, a separate *Traité des Prises*, which contains a complete collection of the French prize ordinances down to that period.

weight is justly attributable to the judgments of mixed tribunals, appointed by the joint consent of the two nations between whom they are to decide, than to those of admiralty courts established by and dependent on the instructions of one nation only. (*a*)

5. Another depository of international law is to be found in the written opinions of official jurists, given confidentially to their own governments. Only a small portion of the controversies which arise between States become public. Before one State requires redress from another, for injuries sustained by itself, or its subjects, it generally acts as an individual would do in a similar situation. It consults its legal advisers, and is guided by their opinion as to the law of the case. Where that opinion has been adverse to the sovereign client, and has been acted on, and the State which submitted to be bound by it was more powerful than its opponent in the dispute, we may confidently assume that the law of nations, such as it was then supposed to be, has been correctly laid down. The archives of the department of foreign affairs of every country contain a collection of such documents, the publication of which would form a valuable addition to the existing materials of international law.[1] (*b*)

(*a*) [Mr. Wheaton published in his "Life of William Pinkney," who was a member of the joint British and American commission, under the treaty of 1794, the opinions delivered by Mr. Pinkney on the questions of international law, involved in the various reclamations before that tribunal. See Wheaton's Life of Pinkney, pp. 193 – 372.]

[1] Senior, Edinburgh Rev. No. 156, art. 1, p. 311.

The written opinions delivered by Sir Leoline Jenkins, Judge of the High Court of Admiralty in the reign of Charles II., in answer to questions submitted to him by the King or by the Privy Council relating to prize causes, were published as an Appendix to Wynne's Life of that eminent civilian. (2 vols. fol. London, 1724.) They form a rich collection of precedents in the maritime law of nations, the value of which is enhanced by the circumstance that the greater part of these opinions were given when England was neutral, and was consequently interested in maintaining the right of neutral commerce and navigation. The decisions they contain are dictated by a spirit of impartiality and equity, which does the more honor to their author as they were addressed to a monarch who gave but little encouragement to those virtues, and as Jenkins himself was too much of a courtier to practice them, except in his judicial capacity. Madison, Examination of the British Doctrine, &c., p. 113. Lond. edit. 1806.

(*b*) [The publicity which attends all transactions in the United States has led to the printing of a large portion of the diplomatic papers, which have been occa-

6. The history of the wars, negotiations, treaties of peace, and other transactions relating to the public intercourse of nations, may conclude this enumeration of the sources of international law.

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sioned by their negotiations with foreign powers from the commencement of the Revolution to the present time. The opinions of the Attorneys-General, given on the application of the President, or of one of the Heads of Department, from 1789 to 1851, and which embrace numerous cases arising under the law of nations, have likewise been published. They comprise 5 vols. 8vo. Washington, 1852.]

CHAPTER II.

NATIONS AND SOVEREIGN STATES.

§ 1. Subjects of international law.

The peculiar subjects of international law are Nations, and those political societies of men called States.

§ 2. Definition of a State.

Cicero, and, after him, the modern public jurists, define a State to be, a body politic, or society of men, united together for the purpose of promoting their mutual safety and advantage by their combined strength.[1]

This definition cannot be admitted as entirely accurate and complete, unless it be understood with the following limitations: —

1. It must be considered as excluding corporations, public or private, created by the State itself, under whose authority they exist, whatever may be the purposes for which the individuals composing such bodies politic, may be associated.

Thus the great association of British merchants incorporated, first, by the crown, and afterwards by Parliament, for the purpose of carrying on trade to the East Indies, could not be considered as a State, even whilst it exercised the sovereign powers of war and peace in that quarter of the globe without the direct control of the crown, and still less can it be so considered since it has been subjected to that control. Those powers are exercised by the East India Company in subordination to the supreme power of the British empire, the external sovereignty

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1 "Respublica est cœtus multitudinis, juris consensu et utilitatis communione societas." Cic. de Rep. l. i. § 25.

"Potestas civilis est, qui civitati præest. Est autem civitas cœtus perfectus liberorum hominum, juris fruendi et communis utilitatis causâ sociatus." Grotius, de Jur. Bel. ac. Pac. lib. i. cap. i. § xiv. No. 2. Vattel, Prélim. § 1. et liv. 1, ch. 1, § 1. Burlamaqui, Droit naturel, tome ii. part 1, ch. 4.

of which is represented by the company towards the native princes and people, whilst the British government itself represents the company towards other foreign sovereigns and States.

2. Nor can the denomination of a State be properly applied to voluntary associations of robbers or pirates, the outlaws of other societies, although they may be united together for the purpose of promoting their own mutual safety and advantage.[1]

3. A State is also distinguishable from an unsettled horde of wandering savages not yet formed into a civil society. The legal idea of a State necessarily implies that of the habitual obedience of its members to those persons in whom the superiority is vested, and of a fixed abode, and definite territory belonging to the people by whom it is occupied.

4. A State is also distinguishable from a Nation, since the former may be composed of different races of men, all subject to the same supreme authority. Thus the Austrian, Prussian, and Ottoman empires, are each composed of a variety of nations and people. So, also, the same nation or people may be subject to several States, as is the case with the Poles, subject to the dominion of Austria, Prussia, and Russia, respectively.

§ 3. Sovereign princes the subjects of international law.

Sovereign princes may become the subjects of international law, in respect to their personal rights, or rights of property, growing out of their personal relations with States foreign to those over whom they rule, or with the sovereigns or citizens of those foreign States. These relations give rise to that branch of the science which treats of the rights of sovereigns in this respect.

§ 4. Individuals, or corporations, the subjects of international law.

Private individuals, or public and private corporations may in like manner, incidentally, become the subjects of this law in regard to rights growing out of their international relations with foreign sovereigns and states, or their subjects and citizens. These relations give rise to that branch of the science which treats of what has

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[1] * * * "nec cœtus piratarum aut latronum civitas est, etiam si fortè æqualitatem quandam inter se servent, sine quâ nullus cœtus posset consistere." Grotius, de Jur. Bel. ac Pac. lib. iii. cap. iii. § ii. No. 1.

been termed private international law, and especially of the conflict between the municipal laws of different States.

The terms sovereign and state used synonymously, or the former used metaphorically for the latter.

But the peculiar objects of international law, are those direct relations which exist between nations and states. Wherever, indeed, the absolute or unlimited monarchical form of government prevails in any State, the person of the prince is necessarily identified with the State itself: *l'Etat c'est moi.* Hence the public jurists frequently use the terms sovereign and state as synonymous. So also the term sovereign is sometimes used in a metaphorical sense merely to denote a state, whatever may be the form of its government, whether monarchical, or republican, or mixed.

§ 5. Sovereignty defined.

Sovereignty is the supreme power by which any State is governed. This supreme power may be exercised either internally or externally.

Internal sovereignty.

Internal sovereignty is that which is inherent in the people of any State, or vested in its ruler, by its municipal constitution or fundamental laws. This is the object of what has been called internal public law, *droit public interne*, but which may more properly be termed constitutional law.

External sovereignty.

External sovereignty consists in the independence of one political society, in respect to all other political societies. It is by the exercise of this branch of sovereignty that the international relations of one political society are maintained, in peace and in war, with all other political societies. The law by which it is regulated has, therefore, been called external public law, *droit public externe*, but may more properly be termed international law.

The recognition of any State by other States, and its admission into the general society of nations, may depend, or may be made to depend, at the will of those other States, upon its internal constitution or form of government, or the choice it may make of its rulers. But whatever be its internal constitution, or form of government, or whoever may be its rulers, or even if it be distracted with anarchy, through a violent contest for the government between different parties among the people, the State still subsists in contemplation of law, until its sovereignty is completely extinguished by the final dissolution of the social

tie, or by some other cause which puts an end to the being of the State.

§ 6. Sovereignty, how acquired.

Sovereignty is acquired by a State, either at the origin of the civil society of which it is composed, or when it separates itself from the community of which it previously formed a part, and on which it was dependent.[1]

This principle applies as well to internal as to external sovereignty. But an important distinction is to be noticed, in this respect, between these two species of sovereignty. The internal sovereignty of a State does not, in any degree, depend upon its recognition by other States. A new State, springing into existence, does not require the recognition of other States to confirm its internal sovereignty. The existence of the State *de facto* is sufficient, in this respect, to establish its sovereignty *de jure*. It is a State because it exists.

Thus the internal sovereignty of the United States of America was complete from the time they declared themselves "free, sovereign, and independent States," on the 4th of July, 1776. It was upon this principle that the Supreme Court determined, in 1808, that the several States composing the Union, so far as regards their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign States, and that they did not derive them from concessions made by the British king. The treaty of peace of 1782, contained a recognition of their independence, not a grant of it. From hence it resulted, that the laws of the several State governments were, from the date of the declaration of independence, the laws of sovereign States, and as such were obligatory upon the people of such State from the time they were enacted. It was added, however, that the court did not mean to intimate the opinion, that even the law of any State of the Union, whose constitution of government had been recognized prior to the 4th of July, 1776, and which law had been enacted prior to that period, would not have been equally obligatory.[2]

The external sovereignty of any State, on the other hand, may

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[1] Kluber, Droit des Gens moderne de l'Europe, § 23.

[2] Cranch's Rep. vol. iv. p. 212. — M'Ilvaine *v.* Coxe's lessee.

require recognition by other States in order to render it perfect and complete. So long, indeed, as the new State confines its action to its own citizens, and to the limits of its own territory, it may well dispense with such recognition. But if it desires to enter into that great society of nations, all the members of which recognize rights to which they are mutually entitled, and duties which they may be called upon reciprocally to fulfil, such recognition becomes essentially necessary to the complete participation of the new State in all the advantages of this society. Every other State is at liberty to grant, or refuse, this recognition, subject to the consequences of its own conduct in this respect; and until such recognition becomes universal on the part of the other States, the new State becomes entitled to the exercise of its external sovereignty as to those States only by whom that sovereignty has been recognized.

§ 7. Identity of a State.

The identity of a State consists in its having the same origin or commencement of existence; and its difference from all other States consists in its having a different origin or commencement of existence. A State, as to the individual members of which it is composed, is a fluctuating body; but in respect to the society, it is one and the same body, of which the existence is perpetually kept up by a constant succession of new members. This existence continues until it is interrupted by some change affecting the being of the State.[1]

How affected by internal revolution.

If this change be an internal revolution, merely altering the municipal constitution and form of government, the State remains the same; it neither loses any of its rights, nor is discharged from any of its obligations.[2]

The habitual obedience of the members of any political society to a superior authority must have once existed in order to constitute a sovereign State. But the temporary suspension of that obedience and of that authority, in consequence of a civil war, does not necessarily extinguish the being of the State, although it may affect for a time its ordinary relations with other States.

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[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 9, § 3. Rutherforth's Inst. b. ii. c. 10, §§ 12, 13. Heffter, Das Europäische Völkerrecht, § 24.

[2] Grotius, lib. ii. cap. 9, § 8. Rutherforth, b. ii. c. 10, § 14. Puffendorf, de Jur. Nat. et Gent. lib. viii. cap. 12, §§ 1–3.

Conduct of foreign States towards another nation involved in civil war.

Until the revolution is consummated, whilst the civil war involving a contest for the government continues, other States may remain indifferent spectators of the controversy, still continuing to treat the ancient government as sovereign, and the government *de facto* as a society entitled to the rights of war against its enemy; or may espouse the cause of the party which they believe to have justice on its side. In the first case, the foreign State fulfils all its obligations under the law of nations; and neither party has any right to complain, provided it maintains an impartial neutrality. In the latter, it becomes, of course, the enemy of the party against whom it declares itself, and the ally of the other; and as the positive law of nations makes no distinction, in this respect, between a just and an unjust war, the intervening State becomes entitled to all the rights of war against the opposite party.[1]

Parties to civil war entitled to rights of war against each other.

If the foreign State professes neutrality, it is bound to allow impartially to both belligerent parties the free exercise of those rights which war gives to public enemies against each other; such as the right of blockade, and of capturing contraband and enemy's property.[2] But the exercise of those rights, on the part of the revolting colony or province against the metropolitan country, may be modified by the obligation of treaties previously existing between that country and foreign States.[3]

§ 8. Identity of a State, how affected by external violence.

If, on the other hand, the change be effected by external violence, as by conquest confirmed by treaties of peace, its effects upon the being of the State are to be determined by the stipulations of those treaties. The conquered and ceded country may be a portion only, or the whole of the vanquished State. If the former, the original State still continues; if the latter, it ceases to exist. In either case, the conquered territory may be incorporated into the conquering State as a province, or it may be united to it as a coördinate State with equal sovereign rights.

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1 Vattel, Droit des Gens, liv. ii. ch. 4, § 56. Martens, Précis du Droit des Gens, liv. iii. ch. 2, §§ 79–82.

2 Wheaton's Rep. vol. iii. p. 610.— United States *v.* Palmer. Vol. iv. p. 63.— The Divina Pastora. Id. p. 502.— The Nuestra Signora de la Caridad.

3 See Part IV. ch. 3, § 3. Rights of War as to Neutrals.

§ 9. By the joint effect of internal and external violence confirmed by treaty.

Such a change in the being of a State may also be produced by the conjoint effect of internal revolution and foreign conquest, subsequently confirmed, or modified and adjusted by international compacts. Thus the House of Orange was expelled from the Seven United Provinces of the Netherlands, in 1797, in consequence of the French Revolution and the progress of the arms of France, and a democratic republic substituted in the place of the ancient Dutch constitution. At the same time the Belgic provinces, which had long been united to the Austrian monarchy as a coördinate State, were conquered by France, and annexed to the French republic by the treaties of Campo Formio and Luneville. On the restoration of the Prince of Orange, in 1813, he assumed the title of Sovereign Prince, and afterwards King of the Netherlands; and by the treaties of Vienna, the former Seven United Provinces were united with the Austrian Low Countries into one State, under his sovereignty.[1]

Here is an example of two States incorporated into one, so as to form a new State, the independent existence of each of the former States entirely ceasing in respect to the other; whilst the rights and obligations of both still continue in respect to other foreign States, except so far as they may be affected by the compacts creating the new State.

In consequence of the revolution which took place in Belgium, in 1830, this country was again severed from Holland, and its independence as a separate kingdom acknowledged and guaranteed by the five great powers of Europe, — Austria, France, Great Britain, Prussia, and Russia. Prince Leopold of Saxe-Cobourg having been subsequently elected king of the Belgians by the national Congress, the terms and conditions of the separation were stipulated by the treaty concluded on the 15th of November, 1831, between those powers and Belgium, which was declared by the conference of London to constitute the invariable basis of the separation, independence, neutrality, and state of territorial possession of Belgium, subject to such modifications as might be the result of direct negotiation between that kingdom and the Netherlands.[2] (*a*)

[1] Wheaton's Hist. Law of Nations, p. 492.

[2] Wheaton's Hist. Law of Nations, pp. 538 – 555.

(*a*) [The annexation of Texas to the United States, consummated by the

§ 10. Province or colony asserting its independence, how considered by other foreign States.

If the revolution in a State be effected by a province or colony shaking off its sovereignty, so long as the independence of the new State is not acknowledged by other powers, it may seem doubtful, in an international point of view, whether its sovereignty can be considered as complete, however it may be regarded by its own government and citizens. It has already been stated, that whilst the contest for the sovereignty continues, and the civil war rages, other nations may either remain passive, allowing to both contending parties all the rights which war gives to public enemies; or may acknowledge the independence of the new State, forming with it treaties of amity and commerce; or may join in alliance with one party against the other. In the first case, neither party has any right to complain so long as other nations maintain an impartial neutrality, and abide the event of the contest. The two last cases involve questions which seem to belong rather to the science of politics than of international law; but the practice of nations, if it does not furnish an invariable rule for the solution of these questions, will, at least, shed some light upon them. The memorable examples of the Swiss Cantons and of the Seven United Provinces of the Netherlands, which so long levied war, concluded peace, contracted alliances, and performed every other act of sovereignty, before their independence was finally acknowledged, — that of the first by the German empire, and that of the latter by Spain, — go far to show the general sense of mankind on this subject.

The acknowledgment of the independence of the United States of America by France, coupled with the assistance secretly rendered by the French court to the revolted colonies, was considered by Great Britain as an unjustifiable aggression, and, under the circumstances, it probably was so.[1] But had the French court conducted itself with good faith, and maintained an impartial neutrality between the two belligerent parties, it may be doubted whether the treaty of commerce, or even the

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admission of the former as a State of the Federal Union, on 29th December, 1845, was a case, so far as foreign powers are concerned, of the complete merger of the sovereignty of the former Republic of Texas in that of the United States.]

[1] Wheaton's Hist. Law of Nations, Pt. iii. § 12, pp. 220–294. Ch. de Martens, Nouvelles Causes célèbres du Droit des Gens, tome i. pp. 370–498.

eventual alliance between France and the United States, could have furnished any just ground for a declaration of war against the former by the British government. The more recent example of the acknowledgment of the independence of the Spanish American provinces by the United States, Great Britain, and other powers, whilst the parent country still continued to withhold her assent, also concurs to illustrate the general understanding of nations, that where a revolted province or colony has declared and shown its ability to maintain its independence, the recognition of its sovereignty by other foreign States is a question of policy and prudence only.

Recognition of its independence by other foreign States.

This question must be determined by the sovereign legislative or executive power of these other States, and not by any subordinate authority, or by the private judgment of their individual subjects. Until the independence of the new State has been acknowledged, either by the foreign State where its sovereignty is drawn in question, or by the government of the country of which it was before a province, courts of justice and private individuals are bound to consider the ancient state of things as remaining unaltered.[1] (*a*)

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[1] Vesey's Ch. Rep. vol. ix. p. 347. — The City of Berne *v.* The Bank of England. Edward's Adm. Rep. vol. i. p. 1. — The Manilla, Appendix IV., Note D. Wheaton's Rep. vol. iii. p. 324. — Hoyt *v.* Gelston. Idem. p. 634. — The United States *v.* Palmer.

(*a*) [It belongs exclusively to the political department of the government to recognize or to refuse to recognize a government in a foreign country, claiming to have displaced the old and established a new one. Kennett *v.* Chambers, Howard's Rep. vol. xiv. p. 38. Quant à la simple reconnaisance, un état étranger n'est point en droit de juger de la légitimité, il doit donc uniquement s'attacher à la seule possession et traiter comme indépendant le gouvernment *de fait*. Garden, Traité Complet de Diplomatie, tom. i. p. 273.

President Jackson, in his special message of 21st December, 1836, in relation to the recognition of Texas, thus refers to the principles on which the United States have proceeded in the acknowledgment of the independence of new States: —

"All questions relative to the government of foreign nations, whether of the old or of the new world, have been treated by the United States as questions of fact only, and our predecessors have cautiously abstained from deciding upon them, until the clearest evidence was in their possession, to enable them not only to decide correctly, but to shield their decision from every unworthy imputation. In all the contests that have arisen out of the revolutions of France, out of the

§ 11. International effects of a change in the person of the sovereign or in the internal constitution of the State.

The international effects produced by a change in the person of the sovereign or in the form of government of any State, may be considered: —

I. As to its treaties of alliance and commerce.

II. Its public debts.

III. Its public domain and private rights of property.

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disputes relating to the crowns of Portugal and Spain, out of the revolutionary movements in those kingdoms, out of the separation of the American possessions of both from the European governments, and out of the numerous and constantly occurring struggles for dominion in Spanish America, so wisely consistent with our just principles has been the action of our government, that we have, under the most critical circumstances, avoided all censure, and encountered no other evil than that produced by a transient estrangement of good will in those against whom we have been, by force of evidence, compelled to decide."

More than ordinary caution was recommended in the case of Texas, as well on account of a large portion of the civilized inhabitants being emigrants from the United States, as from the people of that country having openly resolved, on the acknowledgment of their independence, to seek for admission into the Union as one of the Federal States. Congressional Globe, 1836 – 7, p. 44.

The course of the United States in the recognition of Texas, and which is placed on the same footing with that of Mexico herself, is explained and sustained in the instructions of Mr. Webster, Secretary of State, to Mr. Thompson, Minister to Mexico, April 15, 1842. Webster's Works, vol. vi. p. 434. And Mr. Everett says, of its subsequent annexation, "as a question of public law, there never was an extension of territory more naturally or justifiably made." Mr. Everett, Secretary of State, to the Comte de Sartiges, Dec. 1, 1852. Cong. Doc. 32 Cong. 2 Sess., Senate, Ex. Doc. No. 13, p. 20.

In 1848, a provisional government was formed in Hungary, which was followed, in 1849, by an attempt to dissolve the connection between that kingdom and the empire of Austria, (with which, though having distinct fundamental laws and other political institutions, it was united under one sceptre,) and to make the Hungarian nation an independent European State. This effort would, probably, have been successful, if the parties immediately concerned had been left to themselves. The intervention of Russia, however, at the request of Austria, but which was placed by the Czar on the ground that his own safety was endangered by what was doing and preparing in Hungary, rendered useless all efforts on the part of the revolutionary government. The United States did not interfere in this contest, but they exposed themselves to the complaint of Austria by the measures which they took to be the first to welcome Hungary into the family of nations, by investing an agent in Europe, (Mr. A. Dudley Mann, now, in 1854, Assistant Secretary of State,) with power to declare their willingness to recognize the new State, in the event of its ability to sustain itself. This subject having not only been referred to in the annual message of President Taylor, in December, 1849, but the instructions of Mr. Mann having been communicated to

IV. As to wrongs or injuries done to the government or citizens of another State.

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the Senate, by whom they were ordered to be printed, in March, 1850, the Austrian Chargé d'Affaires, (Mr. Hülsemann,) addressed, (September 30, 1850,) in conformity to the instructions of his government, a note to the Secretary of State, (Mr. Webster,) protesting as well against certain expressions in the instructions of the agent as against the steps taken by the United States to ascertain the progress and probable result of the revolutionary movements in Hungary. He furthermore remarked, that "those who did not hesitate to assume the responsibility of sending Mr. Dudley Mann on such an errand, should, independent of considerations of propriety, have borne in mind that they were exposing their emissary to be treated as a spy;" and he reminded the Secretary, that "even if the government of the United States were to think it proper to take an indirect part in the political movements of Europe, American policy would be exposed to acts of retaliation and to certain inconveniences, which could not fail to affect the commerce and industry of the two hemispheres."

Mr. Webster, in his answer, (December 21, 1850,) states that the President's message to the Senate, being a communication from one department of the government to another, was in the nature of a domestic communication, and that the Austrian Cabinet, by the instructions given to Mr. Hülsemann, was itself interfering with the domestic concerns of a foreign State. "This department," he says, "has, on former occasions, informed the ministers of foreign powers that a communication from the President to either House of Congress is regarded as a domestic communication, of which, ordinarily, no foreign State has cognizance." The note then proceeds to show the consistency of the course pursued by President Taylor with the neutral policy which has invariably guided the government of the United States in its foreign relations, as well as with the established and well settled principles of international intercourse and the doctrines of public law. Mr. Webster admits that the American government and people take a lively interest in the events of this remarkable age, in whatever part of the world they may be exhibited, and that they cannot suppress the thoughts or hopes which arise in men's minds in other countries from contemplating the successful example of free government. The Emperor Joseph II. is alluded to as among the first to discern this necessary consequence of the American Revolution on the sentiments and opinions of the people of Europe.

The sovereigns, forming the European alliance, interfere with the political movements of foreign States and denounce the popular idea of the age, in terms so comprehensive as of necessity to include the United States. Their declaration, after the return of the Bourbons, that all popular or constitutional rights are holden no otherwise than as grants or indulgences from crowned heads; the Laybach circular, in 1821, as well as the address of Francis I. to the Hungarian Diet, in 1820, amount to nothing less than a denial of the lawfulness of the origin of the government of the United States; but that government heard these denunciations of its fundamental principles without remonstrance or the disturbance of its equanimity. The propitious influence of free institutions are

Treaties. I. Treaties are divided by the text writers into *personal* and *real*. The former relate exclusively to the persons of the con-

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exemplified in the unparalleled prosperity of the United States; but they claim no right to take part in the struggles of foreign powers; and if they wish success to countries contending for popular constitutions and national independence, it is only because they regard such constitutions and such national independence as real blessings. They claim no right, however, to take part in the struggles of foreign powers in order to promote these ends.

The attention of the United States was first directed to the affairs of Hungary by the correspondence of their Chargé d'Affaires at Vienna, who being applied to by the chief of the Hungarian government for his good offices, with a view to a suspension of hostilities, was invited by the Imperial Minister of Foreign Affairs to confer with the functionary specially charged with the proceedings in relation to Hungary; and by him he was "thanked for his efforts towards reconciling the existing difficulties." Questions of prudence arise in reference to new States brought by successful revolutions into the family of nations, but it is not required of neutral powers to await the recognition of the parent States. Within the last thirty years eight or ten new States have established independent governments, within the colonial dominions of Spain, and the same thing has been done by Belgium and Greece. All these governments were recognized by some of the leading powers of Europe, as well as by the United States, before they were acknowledged by the States from which they had separated themselves. If the United States had formally acknowledged the independence of Hungary, though no benefit would have resulted from it to either party, it would not have been an act against the law of nations, provided they took no part in her contest with Austria. But the United States did no such thing. Mr. Webster repudiates the idea of Mr. Mann being a spy, whom he defines to be "a person sent by one belligerent to gain secret information of the forces and defences of the other, to be used for hostile purposes." He considers the imputation as distinctly offensive to the American government; and he says, that had the government of Austria subjected Mr. Mann to the treatment of a spy, it would have placed itself out of the pale of civilized nations; and that if it had carried, or attempted to carry into effect any such lawless purpose, the spirit of the people of this country would have demanded immediate hostilities to be waged by the utmost exertion of the the power of the Republic. He reasserts that the steps taken by President Taylor, now protested against by the Austrian government, were warranted by the law of nations, and were agreeable to the usages of civilized States. He defends the language of the instructions, as being a document addressed to its agent, and in reference to which the government of the United States cannot admit the slightest responsibility to the government of His Imperial Majesty. "In respect to the honorary epithet bestowed in Mr. Mann's instructions on the late chief of the revolutionary government of Hungary, Mr. Hülsemann will bear in mind that the government of the United States cannot justly be expected in a confidential communication to its own agent, to withhold from an individual an epithet of distinction, of which a great part of the world thinks him worthy, merely on the

tracting parties, such as family alliances and treaties guaranteeing the throne to a particular sovereign and his family. They

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ground that his own government regards him as a rebel. At an early stage of the American Revolution, while Washington was considered by the English government as a rebel chief, he was regarded on the continent of Europe as an illustrious hero. But Mr. Webster said that he would take the liberty of bringing the Cabinet of Vienna into the presence of its own predecessors, and of citing for its consideration the conduct of the Imperial Government itself. In the year 1777, the war of the American Revolution was raging all over these United States. England was prosecuting that war with a most resolute determination, and by the exertion of all her military means to the fullest extent. Germany was, at that time, at peace with England, and yet an agent of that Congress, which was looked upon by England in no other light than that of a body in open rebellion, was not only received with great respect by the Ambassador of the Empress Queen, at Paris, and by the Minister of the Grand Duke of Tuscany (who afterwards mounted the imperial throne,) but resided in Vienna for a considerable time; not, indeed, officially acknowledged, but treated with courtesy and respect; and the Emperor suffered himself to be persuaded by that agent to exert himself to prevent the German powers from furnishing troops to England to enable her to suppress the rebellion in America. Neither Mr. Hülsemann nor the Cabinet at Vienna, it is presumed, will undertake to say that any thing said or done by this government in regard to the recent war between Austria and Hungary is not borne out, and much more than borne out by this example of the Imperial Court. It is believed that the Emperor Joseph II. habitually spoke in terms of respect and admiration of the character of Washington, as he is known to have done of that of Franklin: and he deemed it no infraction of neutrality to inform himself of the progress of the revolutionary struggle in America, or to express his deep sense of the merits and the talents of those illustrious men who were then leading their country to independence and renown. In 1781, the courts of Russia and Austria proposed a diplomatic Congress of the belligerent powers, to which the commissioner of the United States should be admitted. As to the hypothetical retaliation, which Mr. Hülsemann threatened, the United States are quite willing to take their chances and abide their destiny. While performing with strict fidelity all their neutral duties, nothing will deter either the government or the people of the United States from exercising, at their own discretion, the rights belonging to them as an independent nation, and of forming and expressing their own opinions, freely and at all times, upon the great political events, which may transpire among the civilized nations of the earth. The note concluded by expressing the President's satisfaction that, in the new Constitution of the Austrian Empire, many of the great principles of civil liberty, on which the American institutions stand, are recognized and applied.

Mr. Hülsemann replied, March 11, 1851, stating that the arguments in Mr. Webster's note had not had the effect of changing the views of the Imperial Government as to Mr. Mann's mission, or the tenor or terms of his instructions, but he declined all ulterior discussion of that annoying incident as leading to no

expire, of course, on the death of the king or the extinction of his family. The latter relate solely to the subject-matters of the convention, independently of the persons of the contracting parties. They continue to bind the State, whatever intervening changes may take place in its internal constitution, or in the persons of its rulers. The State continues the same, notwithstanding such change, and consequently the treaty relating to national objects remains in force so long as the nation exists as an independent State. The only exception to this general rule, as to *real* treaties, is where the convention relates to the form of government itself, and is intended to prevent any such change in the internal constitution of the State.[1]

The correctness of this distinction between personal and real treaties, laid down by Vattel, has been questioned by more modern public jurists as not being logically deduced from acknowledged principles. Still it must be admitted that certain changes in the internal constitution of one of the contracting States, or in the person of its sovereign, may have the

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practical result, and concluded, in these words: "President Fillmore declared in his message of the 2d of December last, that he was determined to act towards other nations as the United States desired that other nations should act towards them; and that he had adopted as a rule for his policy, good will towards foreign powers, and the abstaining from interference in their internal affairs. Austria has not demanded, and will never demand, any thing but the putting into practice of those principles; and the Imperial Government is sincerely disposed to remain in friendly relations with the government of the United States, so long as the United States shall not deviate from these principles."

Mr. Webster, in acknowledging, on 15th March, 1851, the receipt of Mr. Hülsemann's note, also expressed the President's regret that his former note was not satisfactory to the Imperial Government as well as his gratification to learn that that government desired the continuance of the friendly relations between the two governments, and that the sentiments, respecting the international relations between the United States and foreign powers, contained in his last annual message, and in accordance with which he intended to act, met the approbation of Mr. Hülsemann's government. He concluded by stating that the principles and policy declared, in answer to the note of 30th September, to be maintained by the United States, as appropriate to their condition, and as being fixed and fastened upon them by their character, their history, and their position among the nations of the world, will not be abandoned or departed from until some extraordinary change shall take place in the general current of human affairs. Webster's Works, vol vi. pp. 488 – 506.]

[1] Vattel, Droit des Gens, liv. ii. ch. 12, §§ 183 – 197.

effect of annulling preëxisting treaties between their respective governments. The obligation of treaties, by whatever denomination they may be called, is founded, not merely upon the contract itself, but upon those mutual relations between the two States which may have induced them to enter into certain engagements. Whether the treaty be termed real or personal, it will continue so long as these relations exist. The moment they cease to exist, by means of a change in the social organization of one of the contracting parties, of such a nature and of such importance as would have prevented the other party from entering into the contract had he forseen this change, the treaty ceases to be obligatory upon him.

Public debts.

II. As to public debts — whether due to or from the revolutionized State — a mere change in the form of government, or in the person of the ruler, does not affect their obligation. The essential form of the State, that which constitutes it an independent community, remains the same; its accidental form only is changed. The debts being contracted in the name of the State, by its authorized agents, for its public use, the nation continues liable for them, notwithstanding the change in its internal constitution.[1] The new government succeeds to the fiscal rights, and is bound to fulfil the fiscal obligations of the former government.

It becomes entitled to the public domain and other property of the State, and is bound to pay its debts previously contracted.[2] (*a*)

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[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 9, § 8, 1–3. Puffendorf, de Jur. Nat. et Gent. lib. viii. cap. 12, §§ 1, 2, 3.

[2] Heffter, Das Europäische Völkerrecht, § 24. Bona non intelliguntur nisi deducto ære alieno.

(*a*) [The obligations incurred by the United States towards the creditors of Texas, by her annexation and admission, in 1845, as a member of the Union, has been deemed a case for the application of the rule in the text, though, possibly, modified by the consideration that, except so far as her Federal duties interfered, Texas retained her internal sovereignty. As regards foreign States, however, there was a complete merger. By the treaty negotiated between the United States and Texas, but which was rejected by the Senate, in 1844, the United States assumed the payment of the debts of Texas, to an amount not exceeding $10,000,000, to be paid, however, almost exclusively out of the proceeds of the sales of her public lands, and President Tyler, in referring to the subject, in his annual message, December, 1844, says, "We could not with honor

Public domain and private rights of property.

III. As to the public domain and private rights of property. If the revolution be successful, and the internal change in the constitution of the State is finally confirmed by the event of the contest, the public domain passes to the new government; but this mutation is not necessarily attended with any alteration whatever in private rights of property.

It may, however, be attended by such a change: it is competent for the national authority to work a transmutation, total or partial, of the property belonging to the vanquished party; and if actually confiscated, the fact must be taken for right. But to work such a transfer of proprietary rights, some positive and unequivocal act of confiscation is essential.

If, on the other hand, the revolution in the government of the State is followed by a restoration of the ancient order of things, both public and private property, not actually confiscated, revert to the original proprietor on the restoration of the legitimate

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take the lands, without assuming the full payment of all incumbrances on them." By the resolution of Congress, 1st March, 1845, proffering annexation to Texas, and admission as a State on certain conditions, which were accepted by her, it is provided that the State of Texas, after ceding all public buildings, fortifications, and other property pertaining to the public defence, shall retain all the public funds, debts, taxes, and dues of every kind due the Republic of Texas, and all vacant and unappropriated lands lying within her limits, to be applied to the payment of the debts and liabilities of the Republic, and the residue, after discharging those debts and liabilities to be disposed of as the State may direct; but in no event were those debts and liabilities to become a charge upon the government of the United States. Notwithstanding, however, this disclaimer of liability, by an act of Congress, of 9th of September, 1850, on a cession to the United States of a portion of the territory of Texas and a further relinquishment by her of all claim upon the United States, for her debts or for indemnity on account of the surrender of the property, referred to in the resolution of annexation, the United States agreed to pay to the State of Texas $10,000,000 in consideration of the establishment of boundaries, cessions of claims to territory and relinquishment of claims, but no more than $5,000,000 were to be paid, till the creditors holding bonds, on which the duties for imports were pledged, should specially release all claims against the United States on account of such bonds. By the annexation and admission into the Union of Texas, all subsequent duties on imports were, of course, payable into the Federal Treasury; and this was understood to be the ground for the distinction between the creditors made in the act. Annual Reg. 1844, p. 305; U. S. Statutes at Large, vol. v. p. 797; vol. viii. p. 446; Cong. Globe, 1849–50; Appx. p. 1564.]

government, as in the case of conquest they revert to the former owners, on the evacuation of the territory occupied by the public enemy. The national domain, not actually alienated by any intermediate act of the State, returns to the sovereign along with the sovereignty. Private property, temporarily sequestered, returns to the former owner, as in the case of such property recaptured from an enemy in war on the principle of the *jus postliminii.*

But if the national domain has been alienated, or the private property confiscated by some intervening act of the State, the question as to the validity of such transfer becomes more difficult of solution.

Even the lawful sovereign of a country may, or may not, by the particular municipal constitution of the State, have the power of alienating the public domain. The general presumption, in mere internal transactions with his own subjects, is, that he is not so authorized.[1] But in the case of international transactions, where foreigners and foreign governments are concerned, the authority is presumed to exist, and may be inferred from the general treaty-making power, unless there be some express limitation in the fundamental laws of the State. So, also, where foreign governments and their subjects treat with the actual head of the State, or the government *de facto*, recognized by the acquiescence of the nation, for the acquisition of any portion of the public domain or of private confiscated property, the acts of such government must, on principle, be considered valid by the lawful sovereign on his restoration, although they were the acts of him who is considered by the restored sovereign as an usurper.[2] On the other hand, it seems that such alienations of public or private property to the subjects of the State, may be annulled or confirmed, as to their internal effects, at the will of the restored legitimate sovereign, guided by such motives of policy as may influence his counsels, reserving the legal rights of *bonæ fidei* purchasers under such alienation to be indemnified for ameliorations.[3]

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[1] Puffendorf, de Jur. Nat. et Gent. lib. viii. cap. 12, §§ 1–3. Vattel, Droit des Gens, liv. i. chap. 21, §§ 260 – 261.

[2] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 14, § 16.

[3] Kluber, Droit des Gens, sec. ii. ch. 1, § 258.

Where the price or equivalent of the property sold or exchanged has accrued to the actual use and profit of the State, the transfer may be confirmed, and the original proprietors indemnified out of the public treasury, as was done in respect to the lands of the emigrant French nobility, confiscated and sold during the revolution. So, also, the sales of the national domains situate in the German and Belgian provinces, united to France during the revolution, and again detached from the French territory by the treaties of Paris and Vienna in 1814 and 1815, or in the countries composing the Rhenish confederation in the kingdom of Italy, and the Papal States, were, in general, confirmed by these treaties, by the Germanic Diet, or by the acts of the respective restored sovereigns. But a long and intricate litigation ensued before the Germanic Diet, in respect to the alienation of the domains in the countries composing the kingdom of Westphalia. The Elector of Hesse Cassel and the Duke of Brunswick refused to confirm these alienations in respect to their territory, whilst Prussia, which power had acknowledged the King of Westphalia, also acknowledged the validity of his acts in the countries annexed to the Prussian dominions by the treaties of Vienna.[1]

IV. As to wrongs or injuries done to the government or citizens of another State; — it seems, that, on strict principle, the nation continues responsible to other States for the damages incurred for such wrongs or injuries, notwithstanding an intermediate change in the form of its government, or in the persons of its rulers. This principle was applied in all its rigor by the victorious allied powers in their treaties of peace with France in 1814 and 1815. More recent examples of its practical application have occurred in the negotiations between the United States and France, Holland, and Naples, relating to the spoliations committed on American commerce under the government of Napoleon and the vassal States connected with the French empire. The responsibility of the restored government of France for those acts of the preceding ruler was hardly denied by it, even during the reigns of the Bourbon kings of the elder branch,

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[1] Conversations Lexikon, art. *Domainen-verkauf.* Heffter, Das Europäische Völkerrecht, § 188. Kluber, offentliches Recht des deutschen Bundes, § 169. Rotteck und Welcker, Staats-Lexikon, art. *Domainen-kaufer.*

Louis XVIII. and Charles X.; and was expressly admitted by the present government (Louis Philippe's) in the treaty of indemnities concluded with the United States, in 1831. The application of the same principle to the measures of confiscation adopted by Murat in the kingdom of Naples was contested by the restored government of that country; but the discussions which ensued were at last terminated, in the same manner, by a treaty of indemnities concluded between the American and Neapolitan governments.

§ 12. Sovereign States defined.

A sovereign State is generally defined to be any nation or people, whatever may be the form of its internal constitution, which governs itself independently of foreign powers.[1]

This definition, unless taken with great qualifications, cannot be admitted as entirely accurate. Some States are completely sovereign and independent, acknowledging no superior but the Supreme Ruler and Governor of the universe. The sovereignty of other States is limited and qualified in various degrees.

Equality of sovereign States.

All sovereign States are equal in the eye of international law, whatever may be their relative power. The sovereignty of a particular State is not impaired by its occasional obedience to the commands of other States, or even the habitual influence exercised by them over its councils. It is only when this obedience, or this influence, assumes the form of express compact, that the sovereignty of the State, inferior in power, is legally affected by its connection with the other. Treaties of equal alliance, freely contracted between independent States, do not impair their sovereignty. Treaties of unequal alliance, guarantee, mediation, and protection, may have the effect of limiting and qualifying the sovereignty according to the stipulations of the treaties.

§ 13. Semi-sovereign States.

States which are thus dependent on other States, in respect to the exercise of certain rights, essential to the perfect external sovereignty, have been termed semi-sovereign States.[2]

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[1] Vattel, Droit des Gens, liv. i. chap. 1, § 4.

[2] Klüber, Droit des Gens moderne de l'Europe, § 24. Heffter, Das Europäische Völkerrecht, § 19.

City of Cracow.

Thus the city of Cracow, in Poland, with its territory, was declared by the Congress of Vienna to be a perpetually free, independent, and neutral State, under the protection of Russia, Austria, and Prussia.[1]

By the final act of the Congress of Vienna, Art. 9, the three great powers, Austria, Russia, and Prussia, mutually engaged to respect, and cause to be respected, at all times, the neutrality of the free city of Cracow and its territory; and they further declared that no armed force should ever be introduced into it under any pretext whatever.

It was at the same time reciprocally understood and expressly stipulated that no asylum or protection should be granted in the free city or upon the territory of Cracow to fugitives from justice, or deserters from the dominions of either of the said high powers, and that upon a demand of extradition being made by the competent authorities, such individuals should be arrested and delivered up without delay under sufficient escort to the guard charged to receive them at the frontier.[2]

United States of the Ionian Islands.

By the convention concluded at Paris on the 5th of November, 1815, between Austria, Great Britain, Prussia, and Russia, it is declared (Art. 1,) that the islands of Corfu, Cephalonia, Zante, St. Maura, Ithaca, Cerigo and Paxo, with their dependencies, shall form a single, free, and independent State; under the denomination of the United States of the Ionian Islands. The second article provides that this State shall be placed under the immediate and exclusive protection of His Majesty the King of the United Kingdom of Great Britain and Ireland, his heirs and successors. By the third article it is provided that the United States of the Ionian Islands shall regulate, with the approbation of the protecting power, their interior organization: and to give all parts of this organization the consistency and necessary action, His Britannic Majesty will devote particular attention to the legislation and general administration

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[1] Acte du Congrès de Vienne du 9 Juin, 1815, Art. 6, 9, 10.

[2] Martens, Nouveau Recueil, tome ii. p. 386. Klüber, Acten des Weiner Congresses, Band V. § 138. By a Convention, signed at Vienna, Nov. 6, 1846, between Russia, Austria, and Prussia, the city of Cracow was annexed to the Empire of Austria. The governments of Great Britain, France, and Sweden protested against this proceeding as a violation of the Federal act of 1815.

of those States. He will appoint a Lord High Commissioner who shall be invested with the necessary authority for this purpose. The fourth article declares, that, in order to carry into effect without delay these stipulations, the Lord High Commissioner shall regulate the forms of convoking a legislative assembly, of which he shall direct the operations, in order to frame a new constitutional charter for the State, to be ratified by His Britannic Majesty. The fifth article stipulates, that, in order to secure to the inhabitants of the United States of the Ionian Islands the advantages resulting from the high protection under which they are placed, as well as for the exercise of the rights incident to this protection, His Britannic Majesty shall have the right of occupying and garrisoning the fortresses and places of the said States. Their military forces shall be under the orders of the commander of the troops of His Britannic Majesty. The sixth article provides that a special convention with the government of the United States of the Ionian Islands shall regulate, according to their revenues, the object relating to the maintenance of the fortresses and the payment of the British garrisons, and their numbers in the time of peace. The same convention shall also ascertain the relations which are to subsist between this armed force and the Ionian government. The seventh article declares that the merchant flag of the Ionian Islands shall bear, together with the colors and arms it bore previous to 1807, those which His Britannic Majesty may grant as a sign of the protection under which the United Ionian States are placed; and to give more weight to this protection, all the Ionian ports are declared, as to honorary and military rights, to be under the British jurisdiction, commercial agents only, or consuls charged only with the care of commercial relations, shall be accredited to the United States of the Ionian Islands; and they shall be subject to the same regulations to which consuls and commercial agents are subject in other independent States.[1]

On comparing this act with the stipulations of the treaty of Vienna relating to the republic of Cracow, a material distinction will be perceived between the nature of the respective sovereignty granted to each of these two States. The "free, independent,

[1] Martens, Nouveau Recueil, tome ii. p. 663.

and strictly neutral city of Cracow" is completely sovereign, though under the protection of Austria, Prussia, and Russia; whilst the Ionian Islands, although they are to form "a single free and independent State," under the protection of Great Britain, are closely connected with the protecting power both by the treaty itself and by the constitution framed in pursuance of its stipulations, in such a manner as materially to abridge both its internal and external sovereignty. In practice, the United States of the Ionian Islands are not only constantly obedient to the commands of the protecting power, but they are governed as a British colony by a Lord High Commissioner named by the British crown, who exercises the entire executive, and participates in the legislative power with the Senate and legislative Assembly, under the constitution of the State.[1]

Besides the free city of Cracow and the United States of the Ionian Islands, several other semi-sovereign or dependent States are recognized by the existing public law of Europe. These are:

1. The Principalities of Moldavia, Wallachia, and Servia, under the *suzeraineté* of the Ottoman Porte and the protectorate of Russia, as defined by the successive treaties between these two powers, confirmed by the treaty of Andrianople, 1829.[2](*a*)

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[1] Martens, Précis du droit des Gens, liv. i, ch. 2, § 20. Note *a*, 3me édition.

[2] Wheaton's Hist. of the Law of Nations, pp. 556 - 560.

(*a*) [Martens, Précis du Droit des Gens, liv. i. ch. 2, § 20, gives the following reference to authorities, establishing the claims of the Princes of Moldavia and Wallachia, to be included among semi-sovereign States. "Le Bret, Magazin, t. i. n. 2, p. 149; Busching Magazin, t. iii. n. 3; Voyez le traité de Kainardgi, de 1774, dans mon Recueil, t. iv. p. 606, de la 1re. ou t. ii. p. 286, de la 2e edit.; la convention expl. de 1779, dans mon Recueil, t. iii. p. 349; de la 1re. t. iii. p. 653, de la 2e edit.; le hattichérif de la Porte, du 28 Decémbre, 1783; dans mon Recueil, t. iii. p. 281, de la 1re. p. 710, de la 2e edit.; le traité de Yassy, de 1792; dans mon Recueil, t. v. p. 67; le traité de Bucharest, de 1812; dans mon Nouveau Recueil, t. iii. p. 397."

The position of these principalities was altogether anomalous, even before their occupation, in 1853, by Russia. By the several treaties determining their relations to the Porte, in 1774, 1792, 1812, further confirmed by the stipulations with Russia, in 1821, it is provided among other things, that Moldavia and Wallachia shall each have a chargé d'affaires of the Greek faith at Constantinople, who shall be received with all the consideration accorded to such persons under the law of

2. The Principality of Monaco, which had been under the protectorate of France from 1641 until the French revolution,

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nations. Kluber, Droit des Gens moderne de l'Europe, § 24, Ann. Reg. 1821, p. 250. By the treaty of Adrianople, of 1829, between Russia and Turkey, it was stipulated that Moldavia and Wallachia being placed under the *suzeraineté* of the Porte, and Russia having guaranteed their prosperity, they were to preserve all their ancient privileges and immunities, including the enjoyment of their religion, perfect security, a national and independent administration, and the full liberty of trade. By a separate act annexed to the treaty, it was provided that the Hospodars, whose election it was stipulated by the treaty of Bucharest, of 1812, should be made by the General Assembly of the Divan, according to the ancient usage of the country, should be invested with their dignity for life, except in case of abdication or expulsion for specific crimes. They were to administer the internal government with the assistance of the Divans. The Sublime Porte engaged to retain no fortified place on the left bank of the Danube, nor to permit any settlement of its Mohammedan subjects in Moldavia and Wallachia. Mussulmans possessing landed property were to sell it to natives, and all the Turkish cities on the left bank of the Danube were to be restored to Wallachia. The governments of the principalities, as being independent in their internal administration, were authorized to establish quarantine regulations, and to maintain a sufficient military force to compel obedience to their decrees. A pecuniary indemnity was to be substituted for the various contributions in kind, and the forced service (corvée) previously exacted. The inhabitants were to enjoy unlimited freedom of trade, subject only to such restraint as the Hospodars, with the consent of the Divans, might impose for the benefit of the country, and they were to be allowed to navigate the Danube in their own vessels as well as to trade to other parts of the Turkish dominions, with passports from their own governments.

As to the Servians, the treaty provided for carrying into effect the separate article of the Convention of Ackerman, of 25th September, 1826, which itself referred to the eighth article of the Treaty of Bucharest. By it, Turkey had, among other stipulations, bound herself to restore the districts separated from Servia, to grant the Servians freedom of religion and commerce, the election of their national chiefs, the independence of the internal administration, the consolidation of the several imposts into a single tax, permission for the merchants to travel with their own passports in the Ottoman States, the establishment of hospitals, schools, and printing offices, and to provide for the exclusion of Mussulmans, with the exception of the Turkish garrisons, from Servia. The hatti-sherif, by which further concessions were to be confirmed, was to be communicated to Russia, whose government was to be kept informed of the execution of the stipulations of the Treaty of Bucharest, in behalf of the Servians. The Prince of Servia, who is elected for life, shares his power with the Senate, also elected for life. A general assembly, named by all the citizens, controls the acts of the Prince and the Senate. Martens, Recueil de Traités, Supplément, tom. vii. p. 397; Annual Reg. 1829, p. 476, 481; Id. 1826, p. 349; Lésur-Annuaire Hist. 1826, app. p. 100; Annuaire des Deux Mondes, 1850, p. 798. The extraordinary assembly of the

was replaced under the same protection by the treaty of Paris, 1814, art. 3, for which was substituted that of Sardinia by the treaty of Paris, 1815, art. 1.[1]

3. The Republic of Polizza in Dalmatia under the Protectorate of Austria.[2]

Divan for the election of the Hospodar of Wallachia is composed of the bishops, the boyards, (nobles,) and the deputies of the towns, and is presided over by the Metropolitan. The election is notified to Russia as well as the Porte. The oath taken by the Prince or Hospodar at the inauguration, was "Je jure au nom de la très Sainte Trinité, d'observer à la lettre et sans y déroger en rien les lois de la principauté de Valachie, d'après la nouvelle constitution de l'état, de les maintenir et les faire observer dans toute leur vigueur." Rev. Etr. et Françoise, t. ii. p. 366. What were the political relations of these principalities at a period subsequent to the last treaties between Turkey and Russia, is elsewhere considered by our author. In a despatch to the Secretary of State, dated at Berlin, 24th May, 1843, Mr. Wheaton says, "Russia has a concurrent voice in the appointment of the Hospodars of Wallachia and Moldavia, and the right of interposing in the elections of the princes of Servia. It seems probable that the control of Russia over Servia will hereafter be exercised in the same manner as in the principalities of Moldavia and Wallachia, where Russian consuls exercise a similar influence over the local authorities to that exercised by the British residents at the courts of the native princes of India, whose dominions are not yet formally annexed to the Anglo-Indian Empire." The entire independence of these principalities was repeatedly, before the present war, the subject of consideration with the cabinets of Europe; and it was understood that the treaty of commerce between Austria and Great Britain, concluded in 1838, contained a secret article, by which these powers agreed to obtain its recognition by the Porte. Wheaton's MS. Despatches. The Convention of Balta-Liman, concluded between Russia and the Porte, in 1849, purported to adopt measures against anarchical proceedings in the principalities of Moldavia and Wallachia; it modified the appointment of the Hospodars, who, by virtue of its provisions, were named for seven years, from 16th June, 1849; and it also suspended the assemblies of the boyards, granted by the organic statute of 1831. It provided, furthermore, for the occupation of the provinces by a joint Russian and Turkish force, of which 10,000 men were to remain till the organic reforms were completed, and it stipulated for the residence of Russian and Turkish commissioners. See for Treaty, Parliamentary Papers for 1849, vol. xxvii. Another semi-sovereign State in Turkey, treated almost as independent by Austria, as well as Russia, is Montenegro; the government of which, both political and ecclesiastical, had been for a century and a half, previous to 1852, vested in the bishop, who designated his successor by will. The spiritual and civil offices are, however, now divided, in consequence of the refusal of the present prince to assume holy orders. Annuaire des Deux Mondes, 1852 – 3, p. 633.]

[1] Martens, Nouveau Recueil, tome ii. pp. 5, 687.

[2] Martens, Précis du Droit des Gens, liv. i. ch. 2, § 20.

4. The former Germanic Empire was composed of a great number of States, which, although enjoying what was called territorial superiority, (*Landeshoheit*,) could not be considered as completely sovereign, on account of their subjection to the legislative and judicial power of the emperor and the empire. These have all been absorbed in the sovereignty of the States composing the present Germanic Confederation, with the exception of the Lordship of Kniphausen, on the North Sea, which still retains its former feudal relation to the Grand Duchy of Oldenburg, and may, therefore, be considered as a semi-sovereign State.[1]

5. Egypt had been held by the Ottoman Porte, during the dominion of the Mamelukes, rather as a vassal State than as a subject province. The attempts of Mehemet Ali, after the destruction of the Mamelukes, to convert his title as a prince-vassal into absolute independence of the Sultan, and even to extend his sway over other adjoining provinces of the empire, produced the convention concluded at London the 15th July, 1840, between four of the great European powers, — Austria, Great Britain, Prussia, and Russia, — to which the Ottoman Porte acceded. In consequence of the measures subsequently taken by the contracting parties for the execution of this treaty, the hereditary Pashalick of Egypt was finally vested by the Porte in Mehemet Ali, and his lineal descendants, on the payment of an annual tribute to the Sultan, as his *suzerain*. All the treaties and all the laws of the Ottoman Empire were to be applicable to Egypt, in the same manner as to other parts of the empire. But the Sultan consented that, on condition of the regular payment of this tribute, the Pasha should collect, in the name and as the delegate of the Sultan, the taxes and imposts legally established, it being, moreover, understood that the Pasha should defray all the expenses of the civil and military administration; and that the military and naval force maintained by him should always be considered as maintained for the service of the State.[2]

§ 14. Tributary and vassal States.

Tributary States, and States having a feudal relation to each other, are still considered as sovereign, so far as their sovereignty is not affected by this relation. Thus,

[1] Heffter, Das Europäische Völkerrecht, § 19.

[2] Wheaton, Hist. Law of Nations, pp. 572–583.

it is evident that the tribute, formerly paid by the principal maritime powers of Europe to the Barbary States, did not at all affect the sovereignty and independence of the former. So also the King of Naples had been a nominal vassal of the Papal See, ever since the eleventh century; but this feudal dependence, abolished in 1818, was never considered as impairing the sovereignty of the kingdom of Naples.[1]

Relations between the Ottoman Porte and the Barbary States.

The political relations between the Ottoman Porte and the Barbary States are of a very anomalous character. Their occasional obedience to the commands of the Sultan, accompanied with the irregular payment of tribute, does not prevent them from being considered by the Christian powers of Europe and America as independent States, with whom the international relations of war and peace are maintained, on the same footing as with other Mohammedan sovereignties. During the Middle Age, and especially in the time of the Crusades, they were considered as pirates:

"Bugia ed Algieri, infami nidi di corsari,"

as Tasso calls them. But they have long since acquired the character of lawful powers, possessing all those attributes which distinguish a lawful State from a mere association of robbers.[2] "The Algerines, Tripolitans, Tunisians, and those of Salee," says Bynkershoek, "are not pirates, but regular organized societies, who have a fixed territory and an established government, with whom we are alternately at peace and at war, as with other nations, and who, therefore, are entitled to the same rights as other independent States. The European sovereigns often enter into treaties with them, and the States-General have done it in several instances. Cicero defines a regular enemy to be: *Qui habet rempublicam, curiam, ærarium, consensum et concordiam civium, rationem aliquam, si res ità tulisset, pacis et fœderis.* (Philip. 4, c. 14.) All these things are to be found among the barbarians of Africa; for they pay the same regard to treaties of peace and alliance that other nations do, who generally attend more to their convenience than to their engagements. And if they should not observe the faith of treaties *with the most scrupu-*

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[1] Ward's Hist. of the Law of Nations, vol. ii. p. 69.

[2] Sir L. Jenkins's Works, vol. ii. p. 791. Robinson's Adm. Rep. vol. iv. p. 5. The Helena.

lous respect, it cannot be well required of them; for it would be required in vain of other sovereigns. Nay, if they should even act with more injustice than other nations do, they should not, on that account, as *Huberus* very properly observes, (De Jure Civitat. l. iii. c. 5, § 4, n. ult.) lose the rights and privileges of sovereign States."[1]

The political relation of the Indian nations on this continent towards the United States, is that of semi-sovereign States, under the exclusive protectorate of another power. Some of these savage tribes have totally extinguished their national fire, and submitted themselves to the laws of the States within whose territorial limits they reside; others have acknowledged, by treaty, that they hold their national existence at the will of the State; others retain a limited sovereignty, and the absolute proprietorship of the soil. The latter is the case with the tribes to the west of Georgia.[2]

Thus the Supreme Court of the United States determined, in 1831, that, though the Cherokee nation of Indians, dwelling within the jurisdictional limits of Georgia, was not a "foreign State" in the sense in which that term is used in the Constitution, nor entitled, as such, to proceed in that Court against the State of Georgia, yet the Cherokees constituted *a State*, or a distinct political society, capable of managing its own affairs and governing itself, and that they had uniformly been treated as such since the first settlement of the country. The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, and responsible in their political capacity. Their relation to the United States was nevertheless peculiar. They were a domestic dependent nation; their relation to us resembled that of a ward to his guardian; and they had an unquestionable right to the lands they occupied, until that right should be extinguished by a voluntary cession to our government.[3]

The same decision was repeated by the Supreme Court, in another case, in 1832. In this case, the Court declared that the British crown had never attempted, previous to the Revolution,

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[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. xvii.

[2] Cranch's Rep. vol. vi. p. 146. Fletcher *v.* Peck.

[3] Peters's Rep. vol. v. p. 1. The Cherokee Nation *v.* The State of Georgia

to interfere with the national affairs of the Indians, farther than to keep out the agents of foreign powers, who might seduce them into foreign alliances. The British government purchased the alliance and dependence of the Indian nations by subsidies, and purchased their lands, when they were willing to sell, at the price they were willing to take, but it never coerced a surrender of them. The British crown considered them as nations, competent to maintain the relations of peace and war, and of governing themselves under its protection. The United States, who succeeded to the rights of the British crown, in respect to the Indians, did the same, and no more; and the protection stipulated to be afforded to the Indians, and claimed by them, was understood by all parties as only binding the Indians to the United States, as dependent allies. A weak power does not surrender its independence and right to self-government, by associating with a stronger and taking its protection. This was the settled doctrine of the Law of Nations; and the Supreme Court therefore concluded and adjudged, that the Cherokee nation was a distinct community, occupying its own territory, with boundaries accurately described, within which the laws of Georgia could not rightfully have any force, and into which the citizens of that State had no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress.[1] (*a*)

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[1] Kent's Comment. on American Law, vol. iii. p. 383.

(*a*) [The native tribes, who were found on the American continent at the time of its discovery, have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. On the contrary, the whole continent was divided and parcelled out, and granted by the governments of Europe, as if it had been vacant and unoccupied land, and the Indians continually held to be and treated as subject to their dominion and control. The United States have maintained the doctrines upon this subject which had been previously established by other nations, and insisted upon the same powers and dominion within their territory. It is too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority; and, where the country occupied by them is not within the limits of one of the States, Congress may, by law, punish any offence committed there, no matter whether the offender be a white man or an Indian. Howard's Rep. vol. iv. p. 572. The United States *v.* Rogers. The same rules, applicable to the aborigines elsewhere on the American continent, are supposed to govern in

§ 15. Single or united States.

States may be either single, or may be united together under a common sovereign prince, or by a federal compact.

§ 16. *Personal* union under the same sovereign.

1. If this union under a common sovereign is not an incorporate union, that is to say, if it is only *personal* in the reigning sovereign; or even if it is *real*, yet if the different component parts are united with a perfect equality of rights, the sovereignty of each State remains unimpaired.[1]

Thus, the kingdom of Hanover was formerly held by the king of the united kingdom of Great Britain and Ireland, separately from his insular dominions. Hanover and the United Kingdom were subject to the same prince, without any dependence on each other, both kingdoms retaining their respective national rights of sovereignty. It is thus that the King of Prussia is also sovereign prince of Neufchatel, one of the Swiss Cantons; which does not, on that account, cease to maintain its relations with the Confederation, nor is it united with the Prussian monarchy.

So, also, the kingdoms of Sweden and Norway are united under one crowned head, each kingdom retaining its separate

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the case of the Mosquito Indians, within the territorial limits of the republic of Nicaragua; to whom the United States deny any claim of sovereignty, or any other title than the Indian right of occupancy, to be extinguished at the will of the discoverer, though a species of undefined protectorate has, several times, been claimed over them by Great Britain. This subject has given rise to much discussion, on account of the contiguity of the territory to the proposed inter-oceanic communication; to promote which a Convention was concluded between the United States and Great Britain, on 19th April, 1850. In that Convention there is no reference to the Mosquito protectorate; though, by a subsequent agreement between these powers, dated 30th April, 1852, to be proposed to the acceptance of the Mosquito king, as well as of Nicaragua and Costa Rica, there is a reservation of a district therein described to these Indians. But Nicaragua refused to enter into the arrangement, and protested against all foreign intervention in her affairs. Congressional Globe, 1852-3, vol. xxvi. p. 268. Id. vol. xxvii. p. 252, 286. U. S. Statutes at Large, vol. viii. p. 174. Annuaire des Deux Mondes, 1852-3, p. 741. Appendix, p. 922. See, also, for negotiations with Great Britain, subsequent to the Inter-Oceanic Treaty, Cong. Doc. 32d Cong. 2d Sess. Senate Ex. Doc. Nos. 12 and 27. Id. 33d Cong. 1st Sess. Senate, Ex. Doc. Nos. 8 and 13.]

[1] Grotius, de Jur. Bel. ac. Pac. lib. ii. cap. 9, §§ 8, 9. Kluber, Droit des Gens Moderne de l'Europe, Part. I. cap. 1, § 27. Heffter, Das Europäische Völkerrecht, § 20.

constitution, laws, and civil administration, the external sovereignty of each being represented by the king.

§ 17. *Real* union under the same sovereign.

The union of the different States composing the Austrian monarchy is a *real* union. The hereditary dominions of the House of Austria, the kingdoms of Hungary and Bohemia, the Lombardo-Venetian kingdom, and other States, are all indissolubly united under the same sceptre, but with distinct fundamental laws, and other political institutions.

It appears to be an intelligible distinction between such a union as that of the Austrian States, and all other unions which are merely *personal* under the same crowned head, that, in the case of a *real* union, though the separate sovereignty of each State may still subsist internally, in respect to its coördinate States and in respect to the imperial crown, yet the sovereignty of each is merged in the general sovereignty of the empire, as to their international relations with foreign powers. The political unity of the States which compose the Austrian Empire forms what the German publicists call a community of States, (*Gesammtstaat*); a community which reposes on historical antecedents. It is connected with the natural progress of things, in the same way as the empire was formed, by an agglomeration of various nationalities, which defended, as long as possible, their ancient constitutions, and only yielded, finally, to the overwhelming influence of superior force. (*a*)

§ 18. Incorporate union.

2. An *incorporate* union is such as that which subsists between Scotland and England, and between Great Britain and Ireland; forming out of the three kingdoms an empire, united under one crown and one legislature, although each may have distinct laws and a separate administration. The sovereignty, internal and external, of each original kingdom

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(*a*) [In 1849, a uniform Constitution for all the States was established, and the charter for the one and indivisible Empire of Austria proclaimed. Annual Register, 1849, p. 317. By the patent of the 31st December, 1851, the fundamental rights recognized by the Constitution of the 4th of March, 1849, were abolished, while centralization was maintained, and provision made for uniform municipal legislation. Annuaire des Deux Mondes, 1852–3, pp. 541–545.]

is completely merged in the united kingdom, thus formed by their successive unions.

§ 19. Union between Russia and Poland.

3. The union established by the Congress of Vienna, between the empire of Russia and the kingdom of Poland, is of a more anomalous character. By the final act of the congress, the duchy of Warsaw, with the exception of the provinces and districts otherwise disposed of, was reunited to the Russian Empire; and it was stipulated that it should be irrevocably connected with that empire by its constitution, to be possessed by his majesty the Emperor of all the Russias, his heirs and successors in perpetuity, with the title of King of Poland; his Majesty reserving the right to give to this State, enjoying a distinct administration, such interior extension as he should judge proper; and that the Poles, subject respectively to Russia, Austria, and Prussia, should obtain a representation and national institutions, regulated according to that mode of political existence which each government, to whom they belong, should think useful and proper to grant.[1]

Charter accorded by the Emperor Alexander to the kingdom of Poland, in 1815.

In pursuance of these stipulations, the Emperor Alexander granted a constitutional charter to the kingdom of Poland, on 15th (27th) November, 1815. By the provisions of this charter, the kingdom of Poland was declared to be united to the Russian Empire by its constitution; the sovereign authority in Poland was to be exercised only in conformity to it; the coronation of the King of Poland was to take place in the Polish capital, where he was bound to take an oath to observe the charter. The Polish nation was to

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[1] "Le Duché de Varsovie, à l'exception des provinces et districts, dont il a été autrement disposé dans les articles suivans, est réuni à l'Empire de Russie. Il y sera lié irrévocablement par sa Constitution, pour être possédé par S. M. l'Empereur de toutes les Russies, ses héritiers et ses successeurs à perpétuité. Sa Majesté Impériale se reserve de donner à cet état, jouissant d'une administration distincte, l'extension intérieure qu'elle jugera convenable. Elle prendra, avec ses autres titres celui de Czar, Roi de Pologne, conformément au protocole usité et consacré par les titres attachés à ses autres possessions.

"Les Polonais, sujets respectifs de la Russie, de l'Autriche, et de la Prusse, obtiendront une représentation et des institutions nationales, réglées d'après la mode d'existence politique que chacun des Gouvernemens auxquelles ils appartiennent jugera utile et convenable de leur accorder." — *Art.* 1.

have a perpetual representation, composed of the king and the two chambers forming the Diet; in which body the legislative power was to be vested, including that of taxation. A distinct Polish national army and coinage, and distinct military orders, were to be preserved in the kingdom.

Manifesto of the Emperor Nicholas, 1832.

In consequence of the revolution and reconquest of Poland by Russia, a manifesto was issued by the Emperor Nicholas, on the 14th (26th) of February, 1832, by which the kingdom of Poland was declared to be perpetually united (*réuni*) to the Russian Empire, and to form an integral part thereof; the coronation of the emperors of Russia and kings of Poland hereafter to take place at Moscow, by one and the same act; the Diet to be abolished, and the army of the empire and of the kingdom to form one army, without distinction of Russian or Polish troops; Poland to be separately administered by a Governor General and Council of Administration, appointed by the emperor, and to preserve its civil and criminal code, subject to alteration and revision by laws and ordinances prepared in the Polish Council of State, and subsequently examined and confirmed in the Section of the Council of State of the Russian Empire, called *The Section for the Affairs of Poland;* consultative Provincial States to be established in the different Polish provinces, to deliberate upon such affairs concerning the general interest of the kingdom of Poland as might be submitted to their consideration; the Assemblies of the Nobles, Communal Assemblies, and Council of the Waiwodes to be continued as formerly. Great Britain and France protested against this measure of the Russian government, as an infraction of the spirit if not of the letter of the treaties of Vienna.[1]

§ 20. Federal union.

4. Sovereign States permanently united together by a federal compact, either form a *system of confederated States*, (properly so called,) or a *supreme federal government*, which has been sometimes called a *compositive State*.[2] (*a*)

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[1] Wheaton's History of the Law of Nations, p. 434.

[2] These two species of federal compacts are very appropriately expressed in the German language, by the respective terms of *Staatenbund* and *Bundesstaat*.

(*a*) [The Confederation of 1778 and the existing Constitution of the United States, are examples of the two classes of cases referred to in the text.]

§ 21. Confederated States, each retaining its own sovereignty.

In the first case, the several States are connected together by a compact, which does not essentially differ from an ordinary treaty of equal alliance. Consequently the internal sovereignty of each member of the union remains unimpaired; the resolutions of the federal body being enforced, not as laws directly binding on the private individual subjects, but through the agency of each separate government, adopting them, and giving them the force of law within its own jurisdiction. Hence it follows, that each confederated individual State, and the federal body for the affairs of common interest, may become, each in its appropriate sphere, the object of distinct diplomatic relations with other nations.

§ 22. Supreme federal government or compositive State.

In the second case, the federal government created by the act of union is sovereign and supreme, within the sphere of the powers granted to it by that act; and the government acts not only upon the States which are members of the confederation, but directly on the citizens. The sovereignty, both internal and external, of each several State is impaired by the powers thus granted to the federal government, and the limitations thus imposed on the several State governments. The compositive State, which results from this league, is alone a sovereign power.

§ 23. Germanic Confederation.

Germany, as it has been constituted under the name of the Germanic Confederation, presents the example of a system of sovereign States, united by an equal and permanent Confederation. All the sovereign princes and free cities of Germany, including the Emperor of Austria and the King of Prussia, in respect to their possessions which formerly belonged to the Germanic Empire, the King of Denmark for the duchy of Holstein, and the King of the Netherlands for the grand duchy of Luxembourg, are united in a perpetual league, under the name of the Germanic Confederation, established by the Federal Act of 1815, and completed and developed by several subsequent decrees.

The object of this union is declared to be the preservation of the external and internal security of Germany, the independence and inviolability of the confederated States. All the members of the confederation, as such, are entitled to equal rights. New

States may be admitted into the union by the unanimous consent of the members.[1]

The affairs of the union are confided to a Federative Diet, which sits at Frankfort-on-the-Maine, in which the respective States are represented by their ministers, and are entitled to the following votes, in what is called the *Ordinary Assembly* of the Diet: —

	Votes.
Austria	1
Prussia	1
Bavaria	1
Saxony	1
Hanover	1
Wurtemburg	1
Baden	1
Electoral Hesse	1
The Grand Duchy of Hesse	1
Denmark (for Holstein)	1
The Netherlands (for Luxemburg)	1
The Grand Ducal and Ducal Houses of Saxony	1
Brunswick and Nassau	1
Mecklenburg-Schwerin and Strelitz	1
Oldenburg, Anhalt, and Schwartzburg	1
Hohenzollern, Lichtenstein, Reuss, Schaumburg, Lippe, Waldeck, and Hesse Homburg	1
The Free Cities of Lubeck, Frankfort, Bremen, and Hamburg	1
Total	17

Austria presides in the Diet, but each State has a right to propose any measure for deliberation.

The Diet is formed into what is called a *General Assembly*, (*Plenum*,) for the decision of certain specific questions. The votes *in pleno* are distributed as follows: —

	Votes.
Austria	4
Prussia	4
Saxony	4
Bavaria	4
Hanover	4
Wurtemburg	4
Baden	3
Electoral Hesse	3

[1] Acte final du Congrès de Vienne, art. 53, 54, 55. Deutsche Bundes acte, vom 8 Juni, 1815, art. 1. Wiener Schluss-Acte, vom 15 Mai, 1820, art. 1, 6.

The Grand Duchy of Hesse	3
Holstein	3
Luxemburg	3
Brunswick	2
Mecklenburg-Schwerin	2
Nassau	2
Saxe Weimar	1
Gotha	1
Coburg	1
Meinengen	1
Hilburghausen	1
Mecklenburg-Strelitz	1
Oldenburg	1
Anhalt-Dessau	1
Anhalt-Bernburg	1
Anhalt-Coethen	1
Schwartzburg-Sondershausen	1
Schwartzburg-Rudolstadt	1
Hohenzollern-Hechingen	1
Lichtenstein	1
Hohenzollern-Sigmaringen	1
Waldeck	1
Reuss (elder branch)	1
Reuss (younger branch)	1
Schaumburg-Lippe	1
Lippe	1
Hesse-Homburg	1
The Free City of Lubeck	1
Frankfort	1
Bremen	1
Hamburg	1
Total	70

Every question to be submitted to the general assembly of the Diet is first discussed in the ordinary assembly, where it is decided by a majority of votes. But, in the general assembly, (*in pleno,*) two thirds of all the votes are necessary to a decision. The ordinary assembly determines what subjects are to be submitted to the general assembly. But all questions concerning the adoption or alteration of the fundamental laws of the Confederation, or organic regulations establishing permanent institutions, as means of carrying into effect the declared objects of the union, or the admission of new members, or concerning the affairs of religion, must be submitted to the general assembly;

and, in all these cases, absolute unanimity is necessary to a final decision.[1]

The Diet has power to establish fundamental laws for the Confederation, and organic regulations as to its foreign, military, and internal relations.[2]

All the States guarantee to each other the possession of their respective dominions within the union, and engage to defend, not only entire Germany, but each individual State, in case of attack. When war is declared by the Confederation, no State can negotiate separately with the enemy, nor conclude peace or an armistice, without the consent of the rest. Each member of the Confederation may contract alliances with other foreign States, provided they are not directed against the security of the Confederation, or the individual States of which it is composed. No State can make war upon another member of the union, but all the States are bound to submit their differences to the decision of the Diet. This body is to endeavor to settle them by mediation; and if unsuccessful, and a juridical sentence becomes necessary, resort is to be had to an austrëgal proceeding, (*Austrägal-Instanz*,) to which the litigating parties are bound to submit without appeal.[3]

Each country of the Confederation is entitled to a local constitution of States.[4] The Diet may guarantee the constitution established by any particular State, upon its application; and thereby acquire the right of settling the differences which may arise respecting its interpretation or execution, either by mediation or judicial arbitration, unless such constitution shall have provided other means of determining controversies of this nature.[5]

In case of rebellion or insurrection, or imminent danger thereof in one or more States of the Confederation, the Diet may interfere to suppress such insurrection or rebellion, as threatening the general safety of the Confederation. And it may in like manner interfere on the application of any one State; or, if the local

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[1] Acte final, art. 58. Wiener Schluss-Acte, art. 12–15.

[2] Acte final, art. 62. [3] Ibid. art. 63.

[4] "In allen Bundestaaten wird eine landeständische Verfassung stattfinden." Bundes-Acte, art. 13.

[5] Wiener Schluss-Acte, art. 60.

government is prevented by the insurgents from making such application, upon the notoriety of the fact of the existence of such insurrection, or imminent danger thereof, to suppress the same by the common force of the Confederation.[1]

In case of the denial or unreasonable delay of justice by any State to its subjects, or others, the aggrieved party may invoke the mediation of the Diet; and if the suit between private individuals involves a question respecting the conflicting rights and obligations of different members of the union, and it cannot be amicably arranged by compromise, the Diet may submit the controversy to the decision of an austrëgal tribunal.[2]

The decrees of the Diet are executed by the local governments of the particular States of the Confederation, on application to them by the Diet for that purpose, excepting in those cases where the Diet interferes to suppress an insurrection or rebellion in one or more of the States; and even in these instances, the execution is to be enforced, so far as practicable, in concert with the local government against whose subjects it is directed.[3]

The subjects of each member of the union have the right of acquiring and holding real property in any other State of the Confederation; of migrating from one State to another; of entering into the military or civil service of any one of the confederated States, subject to the paramount claim of their own native sovereign; and of exemption from every *droit de détraction*, or other similar tax, on removing their effects from one State to another, unless where particular reciprocal compacts have stipulated to the contrary. The Diet has power to establish uniform laws relating to the freedom of the press, and to secure to authors the copyright of their works throughout the Confederation.[4]

The Diet has also power to regulate the commercial intercourse between the different States, and the free navigation of the rivers belonging to the Confederation, as secured by the treaty of Vienna.[5]

The different Christian sects throughout the Confederation are entitled to an equality of civil and political rights; and the Diet is empowered to take into consideration the means of ameliorating

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[1] Weiner Schluss-Acte, art. 25 – 28.
[2] Ibid. art. 29, 30.
[3] Ibid. art. 32.
[4] Bundes-Acte, art. 18.
[5] Ibid. art. 19. Acte final, art. 108 – 117.

the civil condition of the Jews, and of securing to them in all the States of the Confederation the full enjoyment of civil rights, upon condition that they submit themselves to all the obligations of other citizens. In the meantime, the privileges granted to them by any particular State are to be maintained.[1]

Of the internal sovereignty of the States of the Germanic Confederation.

Notwithstanding the great mass of powers thus given to the Diet, and the numerous restraints imposed upon the exercise of internal sovereignty, by the individual States of which the union is composed, it does not appear that the Germanic Confederation can be distinguished, in this respect from an ordinary equal alliance between independent sovereigns, except, by its permanence, and by the greater number and complication of the objects it is intended to embrace. In respect to their internal sovereignty, the several States of the Confederation do not form, by their union, one compositive State, nor are they subject to a common sovereign. Though what are called the fundamental *laws* of the Confederation are framed by the Diet, which has also power to make organic regulations respecting its federal relations; these regulations are not, in general, enforced as laws directly binding on the private individual subjects, but only through the agency of each separate government adopting them, and giving them the force of laws within its own local jurisdiction. If there be cases where the Diet may rightfully enforce its own resolutions directly against the individual subjects, or the body of subjects within any particular State of the Confederation, without the agency of the local governments, (and there appear to be some such cases,) then these cases, when they occur, form an exception to the general character of the union, which then so far becomes a compositive State, or supreme federal government. All the members of the Confederation, as such, are equal in rights; and the occasional obedience of the Diet, and through it of the several States, to the commands of the two great preponderating members of the Confederation, Austria and Prussia, or even the habitual influence exercised by them over its councils, and over the councils of its several States, does not, in legal contemplation, impair their internal sovereignty, or change the legal character of their union.

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[1] Bundes-Acte, art. 16

Of the external sovereignty of these States.

In respect to the exercise by the confederated States of their external sovereignty, we have already seen that the power of contracting alliances with other States, foreign to the Confederation, is expressly reserved to all the confederated States, with the proviso that such alliances are not directed against the security of the Confederation itself, or that of the several States of which it is composed. Each State also retains its rights of legation, both with respect to foreign powers and to its co-States.[1] Although the diplomatic relations of the Confederation with the five great European Powers, parties to the Final Act of the Congress of Vienna, 1815, are habitually maintained by permanent legations from those powers to the Diet at Frankfort, yet the Confederation itself is not habitually represented by public ministers at the courts of these, or any other foreign powers; whilst each confederated State habitually sends to, and receives such minister from other sovereign States, both within and without the Confederation. It is only on extraordinary occasions, such, for example, as the case of a negotiation for the conclusion of a peace or armistice, that the Diet appoints plenipotentiaries to treat with foreign powers.[2]

According to the original plan of confederation as proposed by Austria and Prussia, those States, *not having possessions out of Germany*, were to have been absolutely prohibited from making alliances or war with any power foreign to the Confederation, without the consent of the latter. But this proposition was subsequently modified by the insertion of the above 63d article of the Federal Act of 1815. And the limitations contained in that article upon the war-making and treaty-making powers, both of the Confederation itself and of its several members, were more completely defined by the Final Act of 1820.[3]

It results clearly from these provisions, that such of the confederated States, *as have possessions without the limits of the Confederation*, retain the authority of declaring and carrying on war against any power foreign to the Confederation, independ-

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[1] Klüber, Offentliches Recht des Deutschen Bundes, §§ 461, 463.

[2] Klüber, § 148, § 152 a. Wiener Schluss-Acte, § 49.

[3] Wheaton's Hist. Law of Nations, pp. 447, 448, 457–460.

ently of the Confederation itself, which remains neutral in such a war, unless the Diet shall recognize the existence of a danger threatening the federal territory. The sovereign members of the Confederation, having possessions without the limits thereof, are the Emperor of Austria, the King of Prussia, the King of the Netherlands, and the King of Denmark. Whenever, therefore, any one of these sovereigns undertakes a war in his character of a European power, the Confederation, whose relations and obligations are unaffected by such war, remains a stranger thereto; in other words, it remains neutral, even if the war be defensive on the part of the confederated sovereign as to his possessions without the Confederation, unless the Diet recognizes the existence of a danger threatening the federal territory.[1]

It seems, also, to result from these provisions, taken in connection with the above-mentioned modification in the original plan of Confederation, that even those States *not having possessions without the limits of the Confederation*, retain the sovereign authority of separately declaring and carrying on war, and of negotiating and making peace with any power foreign to the Confederation, excepting in the single case of a war declared by the Confederation itself; in which case, no State can negotiate with the enemy, nor conclude peace or an armistice, without the consent of the rest.

In other cases of disputes, arising between any State of the Confederation and foreign powers, and the former asks the intervention of the Diet, the Confederation may interfere as an ally, or as a mediator; may examine the respective complaints and pretensions of the contending parties. If the result of the investigation is, that the co-State is not in the right, the Diet will make the most serious representations to induce it to renounce its pretensions, will refuse its interference, and, in case of necessity, will take all proper means for the preservation of peace. If, on the contrary, the preliminary examination proves that the confederated State is in the right, the Diet will employ its good offices to obtain for it complete satisfaction and security.[2]

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[1] Wiener Schluss-Acte, art. 46, 47. Klüber, Offentliches Recht des Deutschen Bundes, § 152 f.

[2] Wiener Schluss-Acte, art. 35–49. Klüber, § 462.

The Germanic Confederation is a system of confederated States.

It follows, that not only the internal but the external sovereignty of the several States composing the Germanic Confederation, remains unimpaired, except so far as it may be affected by the express provisions of the fundamental laws authorizing the federal body to represent their external sovereignty. In other respects, the several confederated States remain independent of each other, and of all States foreign to the Confederation. Their union constitutes what the German public jurists call a *Staatenbund*, as contradistinguished from a *Bundesstaat;* that is to say, a supreme Federal Government.[1]

Act of the Diet of 1832.

Very important modifications were introduced into the Germanic Constitution, by an act of the Diet of the 28th of June, 1832. By the 1st article of this act it is declared, that, whereas, according to the 57th article of the Final Act of the Congress of Vienna, the powers of the State ought to remain in the hands of its chief, and the sovereign ought not to be

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[1] Klüber, §§ 103a, 176, 248, 460, 461, 462. Heffter, das Europäische Völkerrecht, § 21.

The Treaty of Paris, 1814, art. 6, declares: "Les états de l'Allemagne seront indépendans et unis par un lien fédératif."

The Final Act of the Congress of Vienna, 1815, art. 54, declares: — "Le but de cette Confédération est le maintien de la sûreté extérieure et intérieure de l'Allemagne, de l'indépendance et de l'inviolabilité de ses états confédérés."

And the *Schluss-Acte*, of 1820, declares: —

"Art. 1. Der deutsche Bund ist ein völkerrechtlicher Verein der deutschen souverainen Fürsten und freien Städte, zur Bewahrung der Unabhängigkeit und Unverletzbarkeit ihrer im Bunde begriffenen Staaten, und zur Erhaltung der innern und äussern Sicherheit Deutschlands.

"Art. 2. Dieser Verein besteht in seinen Innern als eine Gemeinschaft selbständiger, unter sich unabhängiger Staaten, mit wechselfeitigen gleichen Vertrags-Rechten und Vertrags-Obliegenheiten, in seinen äussern Verhältnissen aber, als eine in politischer Einheit verbundene Gesammt-Macht."

TRANSLATION.

Article 1. The Germanic Confederation is an international union of the sovereign princes and Free Cities of Germany, formed for the maintenance of the independence and inviolability of the confederated States, as well as for the internal and external security of Germany.

Art. 2. In respect to its internal relations, this Confederation forms a body of States independent between themselves, and bound to each other by rights and duties reciprocally stipulated. In respect to its external relations, it forms a collective power established on the principle of political union.

bound by the local constitution to require the coöperation of the legislative Chambers, except as to the exercise of certain specified rights; the sovereigns of Germany, as members of the Confederation, have not only the right of rejecting the petitions of the Chambers, contrary to this principle, but the object of the Confederation makes it their duty to reject such petitions.

Art. 2. Since according to the spirit of the said 57th article of the Final Act, and its inductions, as expressed in the 58th article, the Chambers cannot refuse to any German sovereign the necessary means of fulfilling his federal obligations, and those imposed by the local constitution; the cases in which the Chambers endeavor to make their consent to the taxes necessary for these purposes depend upon the assent of the sovereign to their propositions upon any other subject, are to be classed among those cases to which are to be applied the 25th and 26th articles of the Final Act, relating to resistance of the subjects against the government.

Art. 3. The interior legislation of the States belonging to the Germanic Confederation, cannot prejudice the objects of the Confederation, as expressed in the 2d article of the original act of confederation, and in the 1st article of the Final Act; nor can this legislation obstruct in any manner the accomplishment of the federal obligations of the State, and especially the payment of the taxes necessary to fulfil them.

Art. 4. In order to maintain the rights and dignity of the Confederation, and of the assembly representing it, against usurpations of every kind, and, at the same time, to facilitate to the States which are members of the Confederation the maintenance of the constitutional relations between the local governments and the legislative Chambers, there shall be appointed by the Diet, in the first instance, for the term of six years, a commission charged with the supervision of the deliberations of the Chambers, and with directing their attention to the propositions and resolutions which may be found in opposition to the federal obligations, or to the rights of sovereignty, guaranteed by the compacts of the Confederation. This commission is to report to the Diet, which, if it finds the matter proper for further consideration, will put itself in relation with the local government concerned. After the lapse of six years, a new arrangement is to be made for the prolongation of the commission.

Art. 5. Since according to the 59th article of the Final Act, in those States where the publication of the deliberations of the Chambers is secured by the constitution, the free expression of opinion, either in the deliberations themselves, or in their publication through the medium of the press, cannot be so extended as to endanger the tranquillity of the State itself, or of the Confederation in general, all the governments belonging to it mutually bind themselves, as they are already bound by their federal relations, to adopt and maintain such measures as may be necessary to prevent and punish every attack against the Confederation in the local Chambers.

Art. 6. Since the Diet is already authorized by the 17th article of the Final Act, for the maintenance of the true meaning of the original act of confederation, to give its provisions such an interpretation as may be consistent with its object, in case doubts should arise in this respect, it is understood that the Confederation has the exclusive right of interpreting, so as to produce their legal effect, the original act of the Confederation and the Final Act, which right it exercises by its constitutional organ, the Diet.[1]

Act of the Diet of 1834.

Further modifications of the federal constitution were introduced by the act of the Diet of the 30th of October, 1834, in consequence of the diplomatic conferences held at Vienna in the same year, by the representatives of the different States of Germany.

By the 1st article of this last-mentioned act, it is provided that, in case of differences arising between the government of any State and the legislative Chambers, either respecting the interpretation of the local constitution, or upon the limits of the coöperation allowed to the Chambers, in carrying into effect certain determinate rights of the sovereign, and especially in case of the refusal of the necessary supplies for the support of government, conformably to the constitution and the federal obligations of the State, after every legal and constitutional means of conciliation have been exhausted, the differences shall be decided by a federal tribunal of arbitrators, appointed in the following manner: —

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[1] Wheaton, Hist. Law of Nations, pp. 460–486.

2. The representatives, each holding one of the seventeen votes in the ordinary assembly of the Diet, shall nominate, once in every three years, within the States represented by them, two persons distinguished by their reputation and length of service in the judicial and administrative service. The vacancies which may occur, during the said term of three years, in the tribunal of arbitrators thus constituted, shall be in like manner supplied as often as they may occur.

3. Whenever the case mentioned in the first article arises, and it becomes necessary to resort to a decision by this tribunal, there shall be chosen from among the thirty-four, six judges arbitrators, of whom three are to be selected by the government, and three by the Chambers. This number may be reduced to two, or increased to eight, by the consent of the parties: and in case of the neglect of either to name judges they may be appointed by the Diet.

4. The arbitrators thus designated shall elect an additional arbiter as an umpire, and in case of an equal division of votes, the umpire shall be appointed by the Diet.

5. The documents respecting the matter in dispute shall be transmitted to the umpire, by whom they shall be referred to two of the judges arbitrators to report upon the same, the one to be selected from among those chosen by the government, the other from among those chosen by the Chambers.

6. The judges arbitrators, including the umpire, shall then meet at a place designated by the parties, or, in case of disagreement, by the Diet, and decide by a majority of voices the matter in controversy according to their conscientious conviction.

7. In case they require further elucidations before proceeding to a decision, they shall apply to the Diet, by whom the same shall be furnished.

8. Unless in case of unavoidable delay under the circumstances stated in the preceding article, the decision shall be pronounced within the space of four months at farthest from the nomination of the umpire, and be transmitted to the Diet, in order to be communicated to the government of the State interested.

9. The sentence of the judges arbitrators shall have the effect of an austrëgal judgment, and shall be carried into execution in the manner prescribed by the ordinances of the Confederation.

In the case of disputes more particularly relating to the financial budget, the effect of the arbitration extends to the period of time for which the same may have been voted.

10. The costs and expenses of the arbitration are to be exclusively borne by the State interested, and, in case of disputes respecting their payment, they shall be levied by a decree of the Diet.

11. The same tribunal shall decide upon the differences and disputes which may arise, in the free towns of the Confederation, between the Senate and the authorities established by the burghers in virtue of their local constitutions.

12. The different members of the Confederation may resort to the same tribunal of arbitration to determine the controversies arising between them; and whenever the consent of the States respectively interested is given for that purpose, the Diet shall take the necessary measures to organize the tribunal according to the preceding articles.[1] (*a*)

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[1] For further details respecting the Germanic Constitution, see Wheaton's History of the Law of Nations, p. 455, *et seq.*

(*a*) [In 1848, an attempt was made to establish a new German nationality on the basis of a confederation of all the States, with one general Diet or Parliament, and a Central Executive at Frankfort. A national Assembly, elected by the people of the German States, including Schleswig and Holstein, in proportion to their respective populations and in the manner prescribed by the several local constitutions, met on the 18th of May, of that year, and adopted a law for the creation of a provisional central power, which was confided to the Archduke John of Austria, who was installed as Regent on the 12th of July. The Provisional Central Power was vested with the right of deciding on questions of peace and war, and, with the consent of the Assembly, of making treaties with foreign powers. The Diet, representing the old Federal Constitution of Germany, on his election, communicated to the Archduke the assent of their respective governments. A constitution was, at the same time, proposed, by which the Confederation was to be a Constitutional Monarchy, with a Diet of two Chambers. The "Emperor of Germany" was to be hereditary and inviolable, the ministers being responsible for all acts, and the existing German sovereigns to be members, though not exclusively, of the Upper Chamber, of which the other members were to be elected by the sovereigns, or the local Diets of the States; — the Lower Chamber to be elected for six years from electoral districts of equal population, one third retiring biennially. A Court of Imperial Judicature was to be established to have cognizance of all disputes between German States and princes, of disputes between citizens of different States, and disputes between princes and their State Diets; also of all imperial fiscal matters. Free municipal constitutions to be guaranteed; a national guard;

§ 24. United States of America.

The Constitution of the United States of America is of a very different nature from that of the Germanic Confederation. It is not merely a league of sove-

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unrestrained freedom of public meetings; and absolute freedom of religion and the press. Austria refused to take any part in a confederation of this character; but the Assembly proceeded to the adoption of the Constitution, and, on the 28th of March, 1849, elected the King of Prussia Emperor of Germany. The result, however, of his appeal to the other German States, being, that Austria, Wurtemburg, Bavaria, and Hanover, at once declared their decided dissent, and the Frankfort Assembly having refused some modifications of the Constitution, on which the king insisted, he gave a distinct and unequivocal refusal, on the ground that the Imperial Supremacy was an unreal dignity, and the Constitution only a means, gradually, and under legal pretences, to set aside authority and introduce a Republic.

The Plenipotentiaries of Prussia, Hanover, and Saxony, published the draught of a new Imperial Federal Constitution, preceded by an address which stated that, "because the Frankfort Assembly ceased to exist as a legal body when it completed its plan of a constitution, which could not be accepted by the Government without alteration; all the after acts of the Chamber were to be considered as exceeding its powers, and without validity." The constitution thus proposed did not go into operation; but Austria convened at Frankfort, on the 10th of May, 1850, the Diet under the Federal Act of 1815, while Prussia contended that the assumption of a political superiority by Austria, and the summoning of the old Diet, were contrary to the spirit of the Confederation, and the resolution passed by it on the 13th of July, 1848, which abolished the former organization of the whole body. Two rival congresses were sitting at the same time, one at Berlin, headed by Prussia, and one at Frankfort, over which Austria presided. The object of the former was to establish a new Confederation, of which Prussia should be the acknowledged leader; of the latter to preserve to Austria her old preëminence, while taking into consideration a new organization of the Diet. After warlike demonstrations on the part of Austria and Prussia, for which an intervention in the disputes between the Elector of Hesse Cassel and his Diet were the apology, a conference of the different German States was had at the close of the year 1850, at Dresden, on the invitation of the two principal powers. This, after ineffectual efforts on the part of Austria to bring all the States of her Empire into the Germanic Confederation, resulted in the restoration, assented to in May, 1851, by all the German powers, of the old Frankfort Diet, as it had existed since 1815. Annual Reg. 1848, p. 362; id. 1849, p. 347; id. 1850, pp. 313, 320; id. 1851, p. 276.

Brief as was the duration of the "German Empire," it became involved, under circumstances somewhat complicated, in a war with Denmark, growing out of a question which arose before its inauguration, and which was prolonged beyond its own existence — the succession of the crown connected with the integrity of the Danish States. See for the merits of the controversy, "*Mémoire sur l'Histoire du Droit de la Succession à la Couronne de Danemark, par M. Wheaton,*

reign States, for their common defence against external and internal violence, but a supreme federal government, or com-

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read before the French Institute, *Compte Rendu, Mars*, 1847. The Duchies of Schleswig and Holstein were under the same sceptre as Denmark, but in the kingdom, on the failure of heirs in the male line, then anticipated, the females of the same line are called to the throne; while in the Duchies of Schleswig and Holstein, and in Lauenburg ceded to Denmark in 1815, as a partial indemnity for Norway, after the extinction of the males of the elder royal line, the males of the next collateral line succeed. This view of the case, however, was not acquiesced in by the reigning monarch, at least as regards Schleswig and Lauenburg; and though he admitted that there were doubts as to Holstein, he declared that every effort would be made to maintain the integrity of the Danish States. While Holstein and Schleswig were supposed to be united by a rule of succession which would continue the union of the Duchies, long established for administrative purposes, they both claimed to be considered a portion of the Germanic Confederation; but Holstein alone had been represented by Denmark in the Diet under the Federal pact of 1815. It was contended by Denmark, that the Duchy of Schleswig had always, with the exception of a brief interval, during which it enjoyed a doubtful state of independence, been a fief of the crown of Denmark, and that it never had belonged to the old German Empire, while Holstein had been, from time immemorial, a fief of Germany. So early as 1846, the Diet of the Germanic Confederation charged itself with this subject, on the application of Holstein, in order to preserve the rights of the Confederation and of the collateral branches to the succesession. Prussia took the initiative, in 1848, in the recess of the Diet, in sustaining Schleswig-Holstein against Denmark, and the Frankfort Assembly approved the conduct of the King of Prussia, and declared that the Confederation was bound to maintain the interests and rights of the Duchy of Holstein, in union with Schleswig, as being included in the Germanic Confederation. The King of Prussia was requested to represent to the King of Denmark the necessity of evacuating Schleswig, or should that be of no avail, to order out the troops of the Confederation to conquer it, and the Provisional Government of the Duchies was acknowledged by the Confederation, and placed temporarily under the protection of Prussia. Russia and Sweden protested against the interference of Germany, and an armistice was concluded, but not till actual hostilities had occurred. A temporary administration was formed for the Duchies, chosen in part by Denmark, and in part by Prussia, acting for the central power of Germany, which transferred, in 1851, its authority to commissioners of the Germanic Confederation, to be restored after establishing the old relations between Schleswig and Holstein, into the hands of their legitimate sovereign. This was done in February, 1852, and the authority of the King of Denmark again became paramount. The matter of the succession was settled by a treaty, concluded in May, 1852, at the invitation of His Danish Majesty, between Denmark, Great Britain, Austria, France, Russia, Prussia, and Sweden, so as to insure the unity and integrity of the Danish dominions. The King of Denmark, with the assent of the Hereditary Prince, and of the nearest cognates, and in concert with the Emperor of Russia, as head of the elder branch of the House of Holstein-Gottorp, agreed that in default of issue in a direct line

positive State, acting not only upon the sovereign members of the Union, but directly upon all its citizens in their individual

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of Frederic III., of Denmark, his crown should devolve on Prince Christian of Schleswig-Holstein-Sonderbourg-Glücksbourg, and on the issue of his marriage with Louisa, born Princess of Hesse. By this arrangement several, both of the agnate and cognate lines were passed over. Hansard's Debates, vol. cxxiv. p. 440. Annuaire, &c., 1851 – 2, App. p. 961. Annual Reg. 1852, p. 441.

Contrary to the usage which prevailed with the Diet of the Confederation of 1815, which received foreign ministers, but did not maintain regular missions on its own part, there was an interchange of legations between the United States and the German Empire, the latter of which contemplated a national unity, like our own, with reference to foreign powers. Nor were the functions of these ministers confined to mere ordinary relations. In the project to create among other federal institutions a German navy, a war-steamer was purchased by the Imperial Government in the United States, the sailing of which was objected to in consequence of the existence of the war with Denmark, as a violation of the American neutrality act of 20th of April, 1818. The vessel was only permitted, after a protracted negotiation, to leave an American port, on a bond being executed in compliance with the statute, that it should not be employed to cruise or commit hostilities against any State with which the United States were at peace. Annuaire des Deux Mondes, 1852–3, p. 485. Cong. Doc. 31st Cong. 1 Sess. H. of R. Ex. Doc. No. 5.

A reference to the events which have occurred, affecting the Constitution of Germany, would be incomplete without a notice of an institution, which has, for several years, exercised the most important functions in relation to matters usually regarded among the attributes of sovereignty.

One of the objects of the Federal pact of 1815 was the regulation of commerce between the different States. This duty was never, however, undertaken by the Diet, but in 1833 a commercial association between several of the States commenced, under the name of Zollverein, at the head of which was Prussia, and which, in 1845, numbered upwards of twenty sovereign States as members. Another association called the Steuerverein, was formed in 1834, between Hanover and Brunswick, and with which Oldenburg soon after united. Through these unions uniform tariffs were established, all internal custom-houses were abolished, and the duties collected by the frontier States, and distributed among the members of the leagues, according to their respective population. On 4th of April, 1853, a treaty was concluded between all the members of the two associations, (Zollverein and Steuerverein,) uniting them, and extending the existence of the Zollverein to 31st of December, 1865. This arrangement was preceded by a Treaty of Commerce between Austria and Prussia, of the 9th of February, 1853, by which, with the exception of certain monopoly articles, (tobacco, salt, &c.,) they agreed to remove every prohibition between the two countries, with respect to the exportation, importation, or the transit of merchandise. All the German States, which, on the 1st of January, 1854, or subsequently, should belong to the Zollverein, were to have the privilege of acceding to the treaty, as well as the Italian States, united, or which should be united, in a customs-union with Austria. Annuaire, &c., 1852–3, p. 494.

and corporate capacities. It was established, as the Constitution expressly declares, by "the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to them and their pos-

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The Zollverein was not confined to the establishment of commercial intercourse between its own members, but it entered into treaties, through Prussia, whose government had a full power for that purpose, with foreign nations. One of this character, formed on the basis of equivalent and reciprocal reductions of duties, and to effect which had been the principal object of his mission at Berlin, was signed by Mr. Wheaton, on behalf of the United States, on 25th of March, 1844. But, though recommended by the President in two successive Annual Messages and in submitting the treaty to the Senate, the Committee of Foreign Relations of that body reported, that it was "an innovation on the ancient and uniform practice of the government to change (by treaty) duties laid by law;" that "the Constitution, in express terms, delegates the power to Congress to regulate commerce and to impose duties, and to no other; and that the control of trade and the function of taxing belong, without abridgment or participation, to Congress." The Senate having omitted to give their assent to the treaty before their adjournment, the Secretary of State, Mr. Calhoun, in communicating to Mr. Wheaton the result of their proceedings, with a view to the extension of the time for the exchange of ratifications, states, that the objections of the committee were opposed to the uniform practice of the government; and he refers to numerous treaties, which contain stipulations changing the existing laws regulating commerce and navigation, and duties laid by law. "So well," says he, "is the practice settled, that it is believed it has never before been questioned. The only question, it is believed, that was ever made was, whether an Act of Congress was not necessary, to sanction and carry the stipulations making the change into effect." The President had announced to the Senate that, when it was ratified, he would transmit the treaty and accompanying documents to the House of Representatives, for its consideration and action. Cong. Globe, 1843–4, p. 6. Id. 1844–5, p. 5. Cong. Doc. 28th Cong. 1st Sess. Senate-Executive, confidential. Mr. Calhoun to Mr. Wheaton, 28th June, 1844, MS.

It may here be noticed, that the objections made to the Zollverein treaty, founded on the competency of the treaty-making power of the Federal Government, seems no longer to be deemed tenable, inasmuch as the Reciprocity treaty of June, 1854, in reference to the trade between the United States and the British Provinces, though materially varying the existing tariff, was at once ratified, and a law to carry it into effect passed through Congress. U. S. Statutes at Large, 1853–4, p. 587.

Though not successful in any plan of Constitution which would make her sovereign the nominal, as well as real political, chief of Northern Germany, the effect of the Zollverein has been to make Prussia the representative of the minor States in their relations with foreign powers, not only in commercial affairs, but, as a reference to the Extradition Treaty with the United States will show, in other matters.]

terity." This constitution, and the laws made in pursuance thereof, and treaties made under the authority of the United States, are declared to be the supreme law of the land; and that the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding.

Legislative power of the Union.

The legislative power of the Union is vested in a Congress, consisting of a Senate, the members of which are chosen by the local legislatures of the several States, and a House of Representatives, elected by the people in each State. This Congress has power to levy taxes and duties, to pay the debts, and provide for the common defence and general welfare of the Union; to borrow money on the credit of the United States; to regulate commerce with foreign nations, among the several States, and with the Indian tribes; to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcy throughout the Union; to coin money, and fix the standard of weights and measures; to establish post-offices and post-roads; to secure to authors and inventors the exclusive right to their writings and discoveries; to punish piracies and felonies on the high seas, and offences against the law of nations; to declare war, grant letters of marque and reprisal, and regulate captures by sea and land; to raise and support armies; to provide and maintain a navy; to make rules for the government of the land and naval forces; to exercise exclusive civil and criminal legislation over the district where the seat of the federal government is established, and over all forts, magazines, arsenals, and dock-yards belonging to the Union, and to make all laws necessary and proper to carry into execution all these and the other powers vested in the federal government by the Constitution.

Executive power.

To give effect to this mass of sovereign authorities, the executive power is vested in a President of the United States, chosen by electors appointed in each State in such manner as the legislature thereof may direct. The judicial power extends to all cases in law and equity arising under the constitution, laws, and treaties of the Union, and is vested in a Supreme Court, and such inferior tribunals as Congress may establish. The federal judiciary exercises under this grant of power the authority to examine the laws passed by Congress and the several State legislatures, and, in cases proper for judicial determination, to decide on the constitutional validity of such

laws. The judicial power also extends to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

Treaty-making power.

The treaty-making power is vested exclusively in the President and Senate; all treaties negotiated with foreign States being subject to their ratification. No State of the Union can enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in the payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; grant any title of nobility; lay any duties on imports or exports, except such as are necessary to execute its local inspection laws, the produce of which must be paid into the national treasury; and such laws are subject to the revision and control of the Congress. Nor can any State, without the consent of Congress, lay any tonnage duty; keep troops or ships of war in time of peace; enter into any agreement or compact with another State or with a foreign power; or engage in war unless actually invaded, or in such imminent danger as does not admit of delay. The Union guarantees to every State a republican form of government, and engages to protect each of them against invasion, and, on application of the legislature, or of the executive, when the legislature cannot be convened, against domestic violence.

The American Union is a supreme federal government.

It is not within the province of this work to determine how far the internal sovereignty of the respective States composing the Union is impaired or modified by these constitutional provisions. But since all those powers, by which the international relations of these States are maintained with foreign States, in peace and in war, are expressly conferred by the constitution on the federal government, whilst the exercise of these powers by the several States is expressly prohibited, it is evident that the external sovereignty of the nation is exclusively vested in the Union. The independence of the respective

States, in this respect, is merged in the sovereignty of the federal government, which thus becomes what the German public jurists call a *Bundesstaat.* (*a*)

(*a*) [Among the powers of the Federal Government of the United States once questioned, but now deemed to be settled by repeated precedents, universally acquiesced in, is that of acquiring foreign territory, and forming from it new States, This was done by the Treaty of 1803, with France, by which Louisiana was ceded; by the cession, in 1819, by Spain, of the Floridas; and by that of California and New Mexico, by Mexico, in 1848. All these treaties contain provisions, by which the inhabitants of the ceded territory were to be incorporated into the Union of the United States, as soon as might be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights, and immunities, of the citizens of the United States. The power of the General Government to acquire new territory was discussed in the Senate, on the occasion of the Louisiana Treaty, and was placed on the ground that the United States, in common with all other nations, possess the power of making acquisitions of territory, by conquest, cession, or purchase. In that case, it was also held, that it was competent for the treaty-making power to bind the United States, as between nations, to the admission of the ceded territory into the Union, even though the action of Congress, or an amendment of the Constitution, might be necessary to effect the object. The Supreme Court of the United States have also said, that the Constitution confers, absolutely, on the government of the Union the powers of making war and of making treaties; and, consequently, that that government possesses the power of acquiring territory, either by conquest or by treaty. And it was conceded in the argument, that the third section of the fourth article of the Constitution, authorizing the admission of new States into the Union, gives to Congress a power, only limited by their discretion, to admit as many new States as they may think proper, in whatever manner soever the territory comprising those new States may have been acquired. Elliot's Debates, vol. iv. p. 207. Peters's Rep. vol. i. p. 511. — American Insurance Company *v.* Canter. Story on the Constitution, vol. iii. p. 156–161.

The admission of Texas differs from the other cases, not only in being a merger in the American Union of a foreign republic, whose independence had been recognized by Great Britain and France, as well as the United States, but by the manner in which it was effected. The treaty previously negotiated for that purpose not having been ratified by the Senate of the United States, President Tyler made a communication, on 10th of June, 1844, to the House of Representatives, in which he offered his coöperation to effect the result, by any other expedient compatible with the Constitution. The two houses of Congress passed a resolution, approved by the President, 1st March, 1845, giving their consent that the territory included in the Republic of Texas might be erected into a State, to be called the State of Texas, with a republican form of government, to be adopted by the people of the said republic, by deputies, in convention assembled, with the consent of the existing government; in order that the same might be admitted as one of the States of the Union, on the conditions

§ 25. Swiss Confederation.

The Swiss Confederation, as remodelled by the federal pact of 1815, consists of a union between the then twenty-two Cantons of Switzerland; the object of which is declared to be the preservation of their freedom, independence, and security against foreign attack, and of domestic order and tranquillity. The several Cantons guarantee to each other their respective constitutions and territorial possessions. The Confe-

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contained in the resolution. The conditions having been accepted by the Executive Government, the Congress and people of Texas, in convention, and a State Convention, having formed a Constitution, which was laid before Congress, Texas was, on 29th December, 1845, admitted into the Union, on an equal footing with the original States. Congressional Globe, 1843–4. Part I. p. 6, 662. Id. Part II. p. 448. United States Statutes at Large, vol. v. p. 797. Id. vol. ix. p. 108.

There is an apparent departure from the principle, that all negotiations with foreign powers must be with the General Government, and that foreign powers are not to interfere in the relations between the United States and individual States, in the provision contained in the fifth article of the Treaty of August 9th, 1842, that certain payments should be made by the government of the United States to the States of Maine and Massachusetts. This stipulation, which might be construed to justify foreign interference with our federal relations, was deemed by Lord Ashburton to call for a disclaimer, on the part of Great Britain, of the assumption of any responsibility for these engagements, his negotiations having been with the General Government only. Lord Ashburton to Mr. Webster. Webster's Works, vol. vi. p. 289.

But though the government of the United States is, under the Constitution, alone competent to contract with a foreign power, a treaty may contain provisions requiring, as preliminary to its going into operation, the passage of laws, or the performance of other acts by the individual States; but such conditions would no more make them parties to the negotiation than the British American Provinces are to the Convention of the 5th of June, 1854, between the United States and Great Britain, to which the subjoined remarks of the American Attorney-General refer: — "In the case of that treaty, it is stipulated between the high contracting parties that, before it shall take full effect, certain laws shall be enacted by the Provincial Parliaments of Canada, New Brunswick, Nova Scotia, and Prince Edward's Island; but that stipulation is entered into not for any object of the United States, but for purposes of the domestic policy of the British Government, in its relation to those provinces. In like manner, the Federal Government, if it had seen cause, might have proposed a correspondent stipulation, in regard to its coast fisheries; for instance, that the treaty should take effect as to that matter only, on condition of certain laws being enacted by the Legislative Assemblies of such of the several States of the Union as are specially affected by that part of the treaty, in having their coast fisheries thrown open to the subjects of the United Kingdom. But if such a stipulation had been proposed, it would have been for considerations appertaining to the relation of the Federal Government to the individual States of the Union, and not on account of any relation of theirs to the United Kingdom." Opinion of Mr. Cushing, Attorney-General, Oct. 3, 1854.]

deration has a common army and treasury, supported by levies of men and contributions of money, in certain fixed proportions, among the different Cantons. In addition to these contributions, the military expenses of the Confederation are defrayed by duties on the importation of foreign merchandise, collected by the frontier Cantons, according to the tariff established by the Diet, and paid into the common treasury. The Diet consists of one deputy from every Canton, each having one vote, and assembles every year, alternately, at Berne, Zurich, and Lucern, which are called the directing Cantons, (*vorort.*) The Diet has the exclusive power of declaring war, and concluding treaties of peace, alliance, and commerce, with foreign States. A majority of three fourths of the votes is essential to the validity of these acts; for all other purposes, a majority is sufficient. Each Canton may conclude separate military capitulations and treaties, relating to economical matters and objects of police, with foreign powers; provided they do not contravene the federal pact, nor the constitutional rights of the other Cantons. The Diet provides for the internal and external security of the Confederation; directs the operations, and appoints the commanders of the federal army, and names the ministers deputed to other foreign States. The direction of affairs, when the Diet is not in session, is confided to the directing Canton, (*vorort,*) which is empowered to act during the recess. The character of directing Canton alternates every two years, between Zurich, Berne, and Lucerne. The Diet may delegate to the directing Canton, or *vorort*, special full powers, under extraordinary circumstances, to be exercised when the Diet is not in session; adding, when it thinks fit, federal representatives, to assist the *vorort* in the direction of the affairs of the Confederation. In case of internal or external danger, each Canton has a right to require the aid of the other Cantons; in which case, notice is to be immediately given to the *vorort*, in order that the Diet may be assembled, to provide the necessary measures of security.[1]

Constitution of the Swiss Confederation compared with those of the Ger-

The compact, by which the sovereign Cantons of Switzerland are thus united, forms a federal body, which, in some respects, resembles the Germanic Confederation, whilst in others it more nearly approximates

[1] Martens Nouveau Recueil, tom. viii. p. 173.

to the American Constitution. Each Canton retains its original sovereignty unimpaired, for all domestic purposes, even more completely than the German States; but the power of making war, and of concluding treaties of peace, alliance, and commerce, with foreign States, being exclusively vested in the federal Diet, all the foreign relations of the country necessarily fall under the cognizance of that body. In this respect, the present Swiss Confederation differs materially from that which existed before the French Revolution of 1789, which was, in effect, a mere treaty of alliance for the common defence against external hostility, but which did not prevent the several Cantons from making separate treaties with each other, and with foreign powers.[1]

Germanic Confederation and of the United States.

Since the French Revolution of 1830, various changes have taken place in the local constitutions of the different Cantons, tending to give them a more democratic character; and several attempts have been made to revise the federal pact, so as to give it more of the character of a supreme federal government, or *Bundesstaat*, in respect to the internal relations of the Confederation. Those attempts have all proved abortive; and Switzerland still remains subject to the federal pact of 1815, except that three of the original Cantons, — Basle, Unterwalden, and Appenzel, — have been dismembered, so as to increase the whole number of Cantons to twenty-five. But as each division of these three original Cantons is entitled to half a vote only in the Diet, the total number of votes still remains twenty-two, as under the original federal pact.[2] (*a*)

Abortive attempts, since 1830, to change the federal pact of 1815.

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[1] Merlin, Répertoire, tit. *Ministre Public*.

[2] Wheaton, Hist. Law of Nations, p. 494–496.

(*a*) [In 1846, a separate armed league of the seven Catholic Cantons, termed *Sonderbund*, was formed. They had been previously connected by a league, called the League of *Sarnen;* but their new organization became professedly an armed Confederation. Its members bound themselves to furnish contingents of men and money, and to obey a common military authority — all declared to be exclusively for purposes of common defence. This association being at variance with the sixth article of the federal pact, which says, "No alliances shall be formed by the Cantons among each other, prejudicial either to the general confederacy or the rights of the other Cantons," it was resolved by the Diet to be illegal, and declared to be dissolved. At the same time, the excitement was increased by the decree, directing the same Cantons to expel the Jesuits from their territories.

These orders not being complied with, the Diet determined to carry them into effect by force, which was done before the proffer of mediation by the five great powers was received. These events were not however without their influence upon the subsequent occurrences of 1848. On 12th of September of that year a new constitution was voted by the Diet. It commences by acknowledging the sovereignty of the Cantons, but in subordination to the sovereignty of the State. All Swiss citizens are declared equal before the laws. The constitution guarantees, likewise, the Cantonal constitutions; reserving the right of interposing in constitutional questions which may arise in the Cantons. Every separate alliance among the Cantons, every *Sonderbund*, is prohibited. The right of peace or war, and the power of concluding treaties, political or commercial, belong to the Confederation. If any disturbances arise in the interior of any Canton, the federal government may interpose without awaiting an application to it; and it is its duty to interpose when these disturbances compromise the safety of Switzerland. The Confederation has not the right of maintaining a permanent army; but the contingents of the Cantons are organized under federal laws. The treasury of the Confederation pays part of the expenses of military instruction, which is directed and superintended by federal officers. The principle of the organization of the army is, that every Swiss citizen is held to military service.

The Confederation may construct, or grant aid for the construction, of public works. It may suppress the tolls, and transit duties between the Cantons, and collect, at the frontiers of Switzerland, duties of importation, of exportation, and of transit. It is entrusted with the administration of the posts throughout Switzerland; it exercises a supervision over the roads and bridges, fixes the monetary standard, and establishes uniformity of weights and measures; it secures to all Swiss, of every Christian creed, the right of settling, under certain conditions, in any part of the Swiss territory. Freedom of worship, according to any of the acknowledged Christian creeds, is guaranteed; as well as the liberty of the press, and the right of assembling together. The Confederation claims the right of sending out of the territory foreigners, whose presence may compromise the internal tranquillity of Switzerland, or its external peace. The supreme authority is exercised by a Federal Assembly, divided into two Houses or Councils; the National Council, and the Council of the States. The National Council consists of one deputy elected for every twenty thousand souls. The Council of the States is composed of forty-four deputies named by the Cantons; two for each. The two Councils choose a Federal Council, the General-in-Chief, and the Chief of the General Staff. The Federal Council is composed of three members, chosen for three years; and only one member can be chosen from the same Canton. The duties of this Federal Council consist in superintending the interests of the Confederation abroad, and especially its international relations. In cases of urgency, and during the recess of the Federal Assembly, it is authorized to levy the necessary troops, and dispose of them, subject to the duty of convoking the Councils immediately, if the troops raised exceed two thousand men, or if they remain in service more than three weeks. The Council renders an account of its proceedings to the Federal Assembly, at every ordinary session. There is a federal tribunal, for the administration of justice in federal matters; and trial by jury is provided in criminal cases. Annual Reg. 1847, p. 370. Annuaire des Deux Mondes, 1850, p. 37.]

PART SECOND.

ABSOLUTE INTERNATIONAL RIGHTS OF STATES.

PART SECOND.

ABSOLUTE INTERNATIONAL RIGHTS OF STATES.

CHAPTER I.

RIGHT OF SELF-PRESERVATION AND INDEPENDENCE.

§ 1. Rights of sovereign States, with respect to one another.

THE rights, which sovereign States enjoy with regard to one another, may be divided into rights of two sorts: *primitive*, or *absolute* rights; *conditional*, or *hypothetical rights*.[1]

Every State has certain sovereign rights, to which it is entitled as an independent moral being; in other words, because it is a State. These rights are called the *absolute* international rights of States, because they are not limited to particular circumstances.

The rights to which sovereign States are entitled, under particular circumstances, in their relations with others, may be termed their *conditional* international rights; and they cease with the circumstances which gave rise to them. They are consequences of a quality of a sovereign State, but consequences which are not permanent, and which are only produced under particular circumstances. Thus war, for example, confers on belligerent or neutral States certain rights, which cease with the existence of the war.

§ 2. Right of self-preservation.

Of the *absolute* international rights of States, one of the most essential and important, and that which lies

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[1] Klüber, Droit des Gens Moderne de l'Europe, § 36.

at the foundation of all the rest, is the right of self-preservation. It is not only a right with respect to other States, but a duty with respect to its own members, and the most solemn and important which the State owes to them. This right necessarily involves all other incidental rights, which are essential as means to give effect to the principal end.

Right of self-defence modified by the equal rights of other States, or by treaty.

Among these is the right of self-defence. This again involves the right to require the military service of all its people, to levy troops and maintain a naval force, to build fortifications, and to impose and collect taxes for all these purposes. It is evident that the exercise of these absolute sovereign rights can be controlled only by the equal correspondent rights of other States, or by special compacts freely entered into with others, to modify the exercise of these rights.

In the exercise of these means of defence, no independent State can be restricted by any foreign power. But another nation may, by virtue of its own right of self-preservation, if it sees in these preparations an occasion for alarm, or if it anticipates any possible danger of aggression, demand explanations; and good faith, as well as sound policy, requires that these inquiries, when they are reasonable and made with good intentions, should be satisfactorily answered.

Thus, the absolute right to erect fortifications within the territory of the State has sometimes been modified by treaties, where the erection of such fortifications has been deemed to threaten the safety of other communities, or where such a concession has been extorted in the pride of victory, by a power strong enough to dictate the conditions of peace to its enemy. Thus, by the Treaty of Utrecht, between Great Britain and France, confirmed by that of Aix-la-Chapelle, in 1748, and of Paris, in 1763, the French government engaged to demolish the fortifications of Dunkirk. This stipulation, so humiliating to France, was effaced in the treaty of peace concluded between the two countries, in 1783, after the war of the American Revolution. By the treaty signed at Paris, in 1815, between the Allied Powers and France, it was stipulated that the fortifications of Huningen, within the French territory, which had been constantly a subject of uneasiness to the city of Basle, in the Helvetic Confederation, should be demolished, and should never be renewed or replaced

by other fortifications, at a distance of less than three leagues from the city of Basle.[1]

§ 3. Right of intervention or interference.

The right of every independent State to increase its national dominions, wealth, population, and power, by all innocent and lawful means; such as the pacific acquisition of new territory, the discovery and settlement of new countries, the extension of its navigation and fisheries, the improvement of its revenues, arts, agriculture, and commerce, the increase of its military and naval force; is an incontrovertible right of sovereignty, generally recognized by the usage and opinion of nations. It can be limited in its exercise only by the equal correspondent rights of other States, growing out of the same primeval right of self-preservation. Where the exercise of this right, by any of these means, directly affects the security of others, — as where it immediately interferes with the actual exercise of the sovereign rights of other States, — there is no difficulty in assigning its precise limits. But where it merely involves a supposed contingent danger to the safety of others, arising out of the undue aggrandizement of a particular State, or the disturbance of what has been called the balance of power, questions of the greatest difficulty arise, which belong rather to the science of politics than of public law.

The occasions on which the right of forcible interference has been exercised, in order to prevent the undue aggrandizement of a particular State, by such innocent and lawful means as those above mentioned, are comparatively few, and cannot be justified in any case, except in that where an excessive augmentation of its military and naval forces may give just ground of alarm to its neighbors. The internal development of the resources of a country, or its acquisition of colonies and dependencies at a distance from Europe, has never been considered a just motive for such interference. It seems to be felt, with respect to the latter, that distant colonies and dependencies generally weaken, and always render more vulnerable the metropolitan State. And with respect to the former, although the wealth and population of a country is the most effectual means by which its power can be augmented,

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[1] Martens, Recueil de Traités, tom. ii. p. 469.

such an augmentation is too gradual to excite alarm. To which it must be added that the injustice and mischief of admitting that nations have a right to use force, for the express purpose of retarding the civilization and diminishing the prosperity of their inoffensive neighbors, are too revolting to allow such a right to to be inserted in the international code. Interferences, therefore, to preserve the balance of power, have been generally confined to prevent a sovereign, already powerful, from incorporating conquered provinces into his territory, or increasing his dominions by marriage or inheritance, or exercising a dictatorial influence over the councils and conduct of other independent States.[1] (*a*)

Senior, Edinb. Rev. No. 156, art. 1, p. 329.

(*a*) [The fitting out of expeditions against Cuba, in 1851, from the United States, though in violation of their laws, led to an intervention on the part both of England and France, so far as sending orders to their naval commanders to prevent, by force, the landing of adventurers from any nation on the island of Cuba, with hostile intent. Both powers deemed it incumbent on them to make known these instructions to the government of the United States.

In reply to an oral communication made, on the 27th September, 1851, by the British Chargé d'Affaires to the acting Secretary of State, it was stated, that "The President is of opinion, that so far as relates to this republic and its citizens, such an interference as would result from the execution of those orders, if admitted to be rightful in themselves, would nevertheless be practically injurious in its consequences, and do more harm than good. Their execution would be the exercise of a sort of police over the seas in our immediate vicinity, covered as they are with our ships and our citizens; and it would involve, moreover, to some extent, the exercise of a jurisdiction to determine what expeditions were of the character denounced, and who were the guilty adventurers engaged in them."

In a note of 22d October, 1851, to M. de Sartiges, Mr. Crittenden adverts to the fact, that the proposed orders could not be carried into effect without a visitation, examination, and consequent detention of our vessels on our shores, and in the great channels of our coasting trade, and which must invest British and French citizens with the jurisdiction of determining in the first instance, at least, what are the expeditions denounced in their orders, and who are the guilty persons engaged in them, an exercise of power and jurisdiction that could hardly fail to lead to abuses and collisions perilous to the peace that now happily prevails. He adds: "There is another point of view, in which this intervention, on the part of France and England, cannot be viewed with indifference by the President. The geographical position of the island of Cuba, in the Gulf of Mexico, lying at no great distance from the mouth of the river Mississippi, and in the line of the greatest current of the commerce of the United States, would become, in the hands of any powerful European nation, an object of just jealousy and apprehension to the people of this country. A due regard to their own safety and interest must, therefore, make it a matter

Each member of the great society of nations being entirely independent of every other, and living in what has been called a

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of importance to them who shall possess and hold dominion over that island. The government of France and those of other European States were long since officially apprised by this government, that the United States could not see, without concern, that island transferred by Spain to any other European State. President Fillmore fully coeurs in that sentiment, and is apprehensive that the sort of protectorate introduced by the order in question might, in contingencies not difficult to be imagined, lead to results equally objectionable."

To this, it was answered, on 27th October, 1851: "M. de Sartiges had endeavored to establish, in a distinct manner, the two following points: — First, that the instructions issued by the government of the (French) Republic were spontaneous and isolated; secondly, that those instructions were exclusive, for an exclusive case, and applicable only to the class, and not to the nationality of any pirate or adventurer that should attempt to land, in arms, on the shores of a friendly power. He had added that the existing laws in regard to the right of search — laws about which the susceptibilities of the French government are as forcibly roused as those of the government of the United States — were neither directly nor indirectly affected by the order to repel violence by force, since the instructions which have been issued to the commanding officer of the French station were only intended to apply to a case of piracy, the article of the maritime code in force concerning pirates." It was further said, "Those general considerations do not prevent [M. de Sartiges] from acknowledging that the interest which a country feels for another is naturally increased by reason of proximity; and his government, which understands the complicated nature as well as the importance of the relations existing between the United States and Cuba, has seriously considered the declaration formerly made by the government of the United States, and which has been renewed on this occasion, 'that that government could not see, with indifference, the island of Cuba pass from the hands of Spain into those of another European State.' The French government is likewise of opinion that, in case it should comport with the interests of Spain, at some future day, to part with Cuba, the possession of that island, or the protectorship of the same, ought not to fall upon any of the great maritime powers of the world."

This correspondence was closed with a note of Mr. Webster, dated November 18, 1851, in which he says: "Inasmuch as M. de Sartiges now avers that the French government had only in view the execution of the provision of its maritime code against pirates, further discussion of the subject would seem to be for the present unnecessary." Cong. Doc. 32 Cong. 1 Sess. Senate, Ex. Doc. 1, p. 74–82.

But, on 23d April, 1852, separate notes, though of the same tenor, inclosing copies of a despatch from their respective ministers of foreign affairs, (M. de Turgot and the Earl of Malmesbury,) and of the draft of a tripartite convention were addressed by the Ministers of France and England to the Secretary of State. The only substantive article of the convention was: "The high contracting parties hereby severally and collectively disclaim, both now and for hereafter, all intention to obtain possession of the island of Cuba; and they respectively bind themselves to discountenance all attempt to that effect on the part of any power or individuals

state of nature in respect to others, acknowledging no common sovereign, arbiter, or judge; the law which prevails between

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whatever." The accompanying communications contained disclaimers, by England and France, of any such intention by either of those powers, and referring to the previous course of the United States, it is assumed, that "all three parties appear to be fully agreed to repudiate, each for itself, all thought of appropriating Cuba, and that it would therefore seem as if all that remained to be done were to give practical effect to the views entertained in common by the three powers." This it was proposed to do, either by the above convention or by the interchange of formal notes to the same effect.

In acknowledging these notes, on 29th April, 1852, Mr. Webster says, "It has been stated, and often repeated to the government of Spain by this government, under various administrations, not only that the United States have no design upon Cuba themselves, but that, if Spain should refrain from a voluntary cession of the island to any European power, she might rely on the countenance and friendship of the United States to assist her in the defence and preservation of that island. At the same time, it has always been declared to Spain that the government of the United States could not be expected to acquiesce in the cession of Cuba to any European power. . . The present Executive of the United States entirely approves of this past policy of the government, and fully concurs in the general sentiments expressed by M. de Turgot, and understood to be identical with those entertained by the government of Great Britain." He deemed it his duty, at the same time, to remind the ministers, and through them their governments, that "the policy of the government of the United States has uniformly been to avoid, as far as possible, alliances or agreements with other States, and to keep itself free from international obligations, except such as affect directly the interests of the United States themselves." He assured each of them that the President would take his communication into consideration, and give it his best reflections.

The French and English ministers, on 8th of July, 1852, again refer to the proposed convention. In their respective notes, which, like the former papers, only differ in being written by each in his own language, they place the right of intervention of their governments, as well on their general commercial interests as on the special interests, which their subjects, and the government of France, on their own account, have in the question as creditors of Spain. "There is," they say, "at the present time, an evident tendency in the maritime commerce of the world to avail itself of the shorter passages from one ocean to another offered by the different routes existing or in contemplation across the isthmus of Central America. The island of Cuba, of considerable importance in itself, is so placed, geographically, that the nation which may possess it, if the naval forces of that nation should be considerable, might either protect or obstruct the commercial routes from one ocean to the other. Now, if the maritime powers are, on the one hand, out of respect to the rights of Spain and from a sense of their international duty, bound to dismiss all intention of obtaining possession of Cuba, so, on the other hand, are they obliged, out of consideration for the interests of their own subjects or citizens, and the protec-

nations being deficient in those external sanctions by which the laws of civil society are enforced among individuals; and the

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tion of the commerce of other nations, who are entitled to the use of the great highways of commerce on equal terms, to proclaim and assure, as far as in them lies, the present and future neutrality of the island of Cuba." They also state, "that British and French subjects, as well as the French government, are, on different accounts, creditors of Spain for large sums of money. The expense of keeping up an armed force in the island of Cuba of 25,000 men is heavy, and obstructs the government of Spain in the efforts which they make to fulfil their pecuniary engagements. By putting an end to the state of apprehension, which is the cause of those armaments, we should increase to Spain the means of meeting those engagements." The confining to European governments an exclusion from the future sovereignty of Cuba is thus animadverted on: "The word 'European' in juxtaposition with the word 'power,' might justify, on the part of the British and French governments, some doubt as to the signification of the declaration of the United States; and it might be thought that the United States, while, by their declaration, they exclude other nations from profiting by the chances of future possible events, have not debarred themselves by that declaration from availing themselves of such events." The convention is, in conclusion, declared to have but two objects in view, "the one a mutual renunciation of the future possession of Cuba; the other an engagement to cause this renunciation to be respected."

Mr. Everett, having become Secretary of State, announces, on 1st December, 1852, in answer to the preceding notes, that the President declines the invitation of France and England for the United States to become a party to the proposed convention. He expressly disclaims, that our objection to Cuba falling into the possession of any other European government than Spain, arises from our being dissatisfied with any natural increase of territory and power, on the part of France or England. "The President does not covet the acquisition of Cuba for the United States; at the same time, he considers the condition of Cuba as mainly an American question. The proposed convention proceeds on a different principle. It assumes that the United States have no other or greater interest in the question than France and England; whereas it is necessary only to cast one's eye on the map to see how remote are the relations of Europe and how intimate those of the United States with this island." After assigning, as one of the reasons for refusing to become a party to the convention, its certain rejection, by the Senate, he expresses a doubt "whether the Constitution of the United States would allow the treaty-making power to impose a permanent disability on the American government, for all coming time, and prevent it from doing what has been so often done in times past. In 1803, the United States purchased Louisiana of France; and in 1819, they purchased Florida of Spain. It is not within the competence of the treaty-making power, in 1852, effectually to bind the government in all its branches; and, for all coming time, not to make a similar purchase of Cuba. . . . Among the oldest traditions of the Federal Government is an aversion to political alliances with European Powers. . . . The alliance of 1778 with France, — at the time of incalculable benefit to the United States, in

performance of the duties of international law being compelled by moral sanctions only, by fear on the part of nations of provok-

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less than twenty years came near involving us in the wars of the French revolution, and laid the foundation of heavy claims upon Congress, not extinguished to the present day. It is a significant coincidence, that the particular provision of the alliance which occasioned those evils, was that under which France called upon us to aid her in defending her West India possessions against England.

"But the President has a graver objection to entering into the proposed convention. He has no wish to disguise the feeling that the compact, although equal in its terms, would be very unequal in substance. France and England, by entering into it, would disable themselves from obtaining possession of an island remote from their seats of government, belonging to another European power, whose natural right to possess it must always be as good as their own — a distant island in another hemisphere, and one which by no ordinary or peaceful course could ever belong to either of them. . . . The United States, on the other hand, would, by the proposed convention, disable themselves from making an acquisition which might take place without any disturbance of existing foreign relations, and in the natural order of things. The island of Cuba lies at our doors. It commands the approach to the Gulf of Mexico, which washes the shores of five of our States. It bars the entrance of that great river which drains half the North American continent, and with its tributaries forms the largest system of internal water communication in the world. It keeps watch at the door-way of our intercourse with California by the Isthmus route. If an island like Cuba, belonging to the Spanish crown, guarded the entrance of the Thames and the Seine, and the United States should propose a convention like this to France and England, those powers would assuredly feel that the disability assumed by ourselves was far less serious than that which we asked them to assume." "Even now the President cannot doubt that both France and England would prefer any change in the condition of Cuba to that which is most to be apprehended, viz., an internal convulsion which should renew the horrors and the fate of San Domingo." Mr. Everett thus intimates a final objection to the convention: "M. de Turgot and Lord Malmesbury put forward, as the reason for entering into such a compact, 'the attacks which have lately been made on the island of Cuba by lawless bands of adventurers from the United States, with the avowed design of taking possession of that island.' The President is convinced that the conclusion of such a treaty, instead of putting a stop to these lawless proceedings, would give a new and powerful impulse to them. It would strike a death blow to the conservative policy hitherto pursued in this country towards Cuba. No administration of this government, however strong in public confidence in other respects, could stand a day under the odium of having stipulated with the great powers of Europe, that in no future time, under no change of circumstances, by no amicable arrangement with Spain, by no act of lawful war, (should that calamity unfortunately occur,) by no consent of the inhabitants of the island, should they, like the possessions of Spain on the American continent, succeed in rendering themselves independent; in fine, by no overruling necessity of self-preservation should the United States ever make the acquisition of Cuba." Cong. Doc. 32 Cong. 2 Sess. Senate, Ex. Doc. No. 13.]

ing general hostility, and incurring its probable evils in case they should violate this law; an apprehension of the possible consequences of the undue aggrandizement of any one nation upon the independence and the safety of others, has induced the States of modern Europe to observe, with systematic vigilance, every material disturbance in the equilibrium of their respective forces. This preventive policy has been the pretext of the most bloody and destructive wars waged in modern times, some of which have certainly originated in well-founded apprehensions of peril to the independence of weaker States, but the greater part have been founded upon insufficient reasons, disguising the real motives by which princes and cabinets have been influenced. Wherever the spirit of encroachment has really threatened the general security, it has commonly broken out in such overt acts as not only plainly indicated the ambitious purpose, but also furnished substantive grounds in themselves sufficient to justify a resort to arms by other nations. Such were the grounds of the confederacies created, and the wars undertaken to check the aggrandizement of Spain and the house of Austria, under Charles V. and his successors; — an object finally accomplished by the treaty of Westphalia, which so long constituted the written public law of Europe. The long and violent struggle between the religious parties engendered by the Reformation in Germany, spread throughout Europe, and became closely connected with political interests and ambition. The great Catholic and Protestant powers mutually protected the adherents of their own faith in the bosom of rival States. The repeated interference of Austria and Spain in favor of the Catholic faction in France, Germany, and England, and of the Protestant powers to protect their persecuted brethren in Germany, France, and the Netherlands, gave a peculiar coloring to the political transactions of the age. This was still more heightened by the conduct of Catholic France under the ministry of Cardinal Richelieu, in sustaining, by a singular refinement of policy, the Protestant princes and people of Germany against the house of Austria, whilst she was persecuting with unrelenting severity her own subjects of the reformed faith. The balance of power adjusted by the peace of Westphalia was once more disturbed by the ambition of Louis XIV., which compelled the Protestant States of Europe to unite with the house of Aus-

Wars of the Reformation.

tria against the encroachments of France herself, and induced the allies to patronize the English Revolution of 1688, whilst the French monarch interfered to support the pretensions of the Stuarts. These great transactions furnished numerous examples of interference by the European States in the affairs of each other, where the interest and security of the interfering powers were supposed to be seriously affected by the domestic transactions of other nations, which can hardly be referred to any fixed and definite principle of international law, or furnish a general rule fit to be observed in other apparently analogous cases.[1]

§ 4. Wars of the French Revolution.

The same remarks will apply to the more recent, but not less important events, growing out of the French Revolution. They furnish a strong admonition against attempting to reduce to a rule, and to incorporate into the code of nations, a principle so indefinite, and so peculiarly liable to abuse, in its practical application. The successive coalitions formed by the great European monarchies against France subsequent to her first revolution of 1789, were avowedly designed to check the progress of her revolutionary principles, and the extension of her military power. Such was the principle of intervention in the internal affairs of France, avowed by the Allied Courts, and by the publicists who sustained their cause. France, on her side, relying on the independence of nations, contended for non-intervention as a right. The efforts of these coalitions ultimately resulted in the formation of an alliance, intended to be permanent, between the four great powers of Russia, Austria, Prussia, and Great Britain, to which France subsequently acceded, at the Congress of Aix-la-Chapelle, in 1818, constituting a sort of superintending authority in these powers over the international affairs of Europe, the precise extent and objects of which were never very accurately defined. As interpreted by those of the contracting powers, who were also the original parties to the compact called the Holy Alliance, this union was intended to form a perpetual system of intervention among the European States, adapted to prevent any such change in the internal forms of their respective governments, as might endanger the existence of the monarchical institutions

Alliance of the five great European powers.

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[1] Wheaton, Hist. Law of Nations, Pt. I. §§ 2, 3, pp. 80–88.

which had been reëstablished under the legitimate dynasties of their respective reigning houses. This general right of interference was sometimes defined so as to be applicable to every case of popular revolution, where the change in the form of government did not proceed from the voluntary concession of the reigning sovereign, or was not confirmed by his sanction, given under such circumstances as to remove all doubt of his having freely consented. At other times, it was extended to every revolutionary movement pronounced by these powers to endanger, in its consequences, immediate or remote, the social order of Europe, or the particular safety of neighboring States.

The events, which followed the Congress of Aix-la-Chapelle, prove the inefficacy of all the attempts that have been made to establish a general and invariable principle on the subject of intervention. It is, in fact, impossible to lay down an absolute rule on this subject; and every rule that wants that quality must necessarily be vague, and subject to the abuses to which human passions will give rise, in its practical application.

§ 5. Congress of Aix-la-Chapelle, of Troppau and of Laybach.

The measures adopted by Austria, Russia, and Prussia, at the Congress of Troppau and Laybach, in respect to the Neapolitan Revolution of 1820, were founded upon principles adapted to give the great powers of the European continent a perpetual pretext for interfering in the internal concerns of its different States. The British government expressly dissented from these principles, not only upon the ground of their being, if reciprocally acted on, contrary to the fundamental laws of Great Britain, but such as could not safely be admitted as part of a system of international law. In the circular despatch, addressed on this occasion to all its diplomatic agents, it was stated that, though no government could be more prepared than the British government was to uphold the right of any State or States to interfere, where their own immediate security or essential interests are seriously endangered by the internal transactions of another State, it regarded the assumption of such a right as only to be justified by the strongest necessity, and to be limited and regulated thereby; and did not admit that it could receive a general and indiscriminate application to all revolutionary movements, without reference to their immediate bearing upon some particular State or States, or

that it could be made, prospectively, the basis of an alliance. The British government regarded its exercise as an exception to general principles of the greatest value and importance, and as one that only properly grows out of the special circumstances of the case; but it at the same time considered, that exceptions of this description never can, without the utmost danger, be so far reduced to rule, as to be incorporated into the ordinary diplomacy of States, or into the institutes of the Law of Nations.[1]

§ 6. Congress of Verona.

The British government also declined being a party to the proceedings of the Congress held at Verona, in 1822, which ultimately led to an armed interference by France, under the sanction of Austria, Russia, and Prussia, in the internal affairs of Spain, and the overthrow of the Spanish Constitution of the Cortes. The British government disclaimed for itself, and denied to other powers, the right of requiring any changes in the internal institutions of independent States, with the menace of hostile attack in case of refusal. It did not consider the Spanish Revolution as affording a case of that direct and imminent danger to the safety and interests of other States, which might justify a forcible interference. The original alliance between Great Britain and the other principal European powers, was specifically designed for the reconquest and liberation of the European continent from the military dominion of France; and, having subverted that dominion, it took the state of possession, as established by the peace, under the joint protection of the alliance. It never was, however, intended as an union for the government of the world, or for the superintendence of the internal affairs of other States. No proof had been produced to the British government of any design, on the part of Spain, to invade the territory of France; of any attempt to introduce disaffection among her soldiery; or of any project to undermine her political institutions; and, so long as the struggles and disturbances of Spain should be confined within the circle of her own territory, they could not be admitted by the British govern-

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[1] Lord Castlereagh's Circular Dispatch, Jan. 19, 1821. Annual Register, vol. lxii. Part II. p. 737.

ment to afford any plea for foreign interference. If the end of the last and the beginning of the present century saw all Europe combined against France, it was not on account of the internal changes which France thought necessary for her own political and civil reformation; but because she attempted to propagate, first, her principles, and afterwards her dominion, by the sword.[1]

§ 7. War between Spain and her American colonies.

Both Great Britain and the United States, on the same occasion, protested against the right of the Allied Powers to interfere, by forcible means, in the contest between Spain and her revolted American Colonies. The British government declared its determination to remain strictly neutral, should the war be unhappily prolonged; but that the junction of any foreign power, in an enterprise of Spain against the colonies, would be viewed by it as constituting an entirely new question, and one upon which it must take such decision as the interests of Great Britain might require. That it could not enter into any stipulation, binding itself either to refuse or delay its recognition of the independence of the colonies, nor wait indefinitely for an accommodation between Spain and the colonies; and that it would consider any foreign interference, by force or by menace, in the dispute between them, as a motive for recognizing the latter without delay.[2]

The United States government declared that it should consider any attempt, on the part of the allied European powers, to extend their peculiar political system to the American continent, as dangerous to the peace and safety of the United States. With the existing colonies or dependencies of any European power they had not interfered, and should not interfere; but with respect to the governments, whose independence they had recognized, they could not view any interposition for the purpose of oppressing them, or controlling in any other manner

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[1] Confidential Minute of Lord Castlereagh on the Affairs of Spain, communicated to the Allied Courts in May, 1823. Annual Register, vol. lxv.; *Public Documents*, p. 93. Mr. Secretary Canning's Letter to Sir C. Stuart, 28th Jan. 1823, p. 114. Same to the Same, 31st March, 1823, p. 141.

[2] Memorandum of Conference between Mr. Secretary Canning and Prince Polignac, 9th October, 1823. Annual Register, vol. lxvi. p. 99. *Public Documents.*

their destiny, in any other light than as a manifestation of an unfriendly disposition towards the United States. They had declared their neutrality in the war between Spain and those new governments, at the time of their recognition; and to this neutrality they should continue to adhere, provided no change should occur, which, in their judgment, should make a correspondent change, on the part of the United States, indispensable to their own security. The late events in Spain and Portugal showed that Europe was still unsettled. Of this important fact no stronger proof could be adduced than that the Allied Powers should have thought it proper, on any principle satisfactory to themselves, to have interposed by force in the internal concerns of Spain. To what extent such interpositions might be carried, on the same principle, was a question on which all independent powers, whose governments differed from theirs, were interested, — even those most remote, — and none more so than the United States.

The policy of the American government, in regard to Europe, adopted at an early stage of the war which had so long agitated that quarter of the globe, nevertheless remained the same. This policy was, not to interfere in the internal concerns of any of the European powers; to consider the government, *de facto*, as the legitimate government for them; to cultivate friendly relations with it, and to preserve those relations by a frank, firm, and manly policy; meeting, in all instances, the just claims of every power, — submitting to injuries from none. But, with regard to the American continents, circumstances were widely different. It was impossible that the Allied Powers should extend their political system to any portion of these continents, without endangering the peace and happiness of the United States. It was therefore impossible that the latter should behold such interposition in any form with indifference.[1]

§ 8. British interference in the affairs of Portugal, in 1826.

Great Britain had limited herself to protesting against the interference of the French government in the internal affairs of Spain, and had refrained from interposing

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[1] President Monroe's Message to Congress, 2d December, 1823. Annual Register, vol. lxv. *Public Documents*, p. 193.

by force, to prevent the invasion of the peninsula by France. The constitution of the Cortes was overturned, and Ferdinand VII. restored to absolute power. These events were followed by the death of John VI., King of Portugal, in 1825. The constitution of Brazil had provided that its crown should never be united on the same head with that of Portugal; and Dom Pedro resigned the latter to his infant daughter, Dona Maria, appointing a regency to govern the kingdom during her minority, and, at the same time, granting a constitutional charter to the European dominions of the House of Braganza. The Spanish government, restored to the plenitude of its absolute authority, and dreading the example of the peaceable establishment of a constitutional government in a neighboring kingdom, countenanced the pretensions of Dom Miguel to the Portuguese crown, and supported the efforts of his partisans to overthrow the regency and the charter. Hostile inroads into the territory of Portugal were concerted in Spain, and executed with the connivance of the Spanish authorities, by Portuguese troops, belonging to the party of the Pretender, who had deserted into Spain, and were received and succoured by the Spanish authorities on the frontiers. Under these circumstances, the British government received an application from the regency of Portugal, claiming, in virtue of the ancient treaties of alliance and friendship subsisting between the two crowns, the military aid of Great Britain against the hostile aggression of Spain. In acceding to that application, and sending a corps of British troops for the defence of Portugal, it was stated by the British minister that the Portuguese Constitution was admitted to have proceeded from a legitimate source, and it was recommended to Englishmen by the ready acceptance which it had met with from all orders of the Portuguese people. But it would not be for the British nation to force it on the people of Portugal, if they were unwilling to receive it; or if any schism should exist among the Portuguese themselves, as to its fitness and congeniality to the wants and wishes of the nation. They went to Portugal in the discharge of a sacred obligation, contracted under ancient and modern treaties. When there, nothing would be done by them to enforce the establishment of the constitution; but they must take care that nothing was done by others to prevent it from being fairly carried into effect. The hostile

aggression of Spain, in countenancing and aiding the party opposed to the Portuguese Constitution, was in direct violation of repeated solemn assurances of the Spanish cabinet to the British government, engaging to abstain from such interference. The sole object of Great Britain was to obtain the faithful execution of those engagements. The former case of the invasion of Spain by France, having for its object to overturn the Spanish Constitution, was essentially different in its circumstances. France had given to Great Britain cause of war, by that aggression upon the independence of Spain. The British government might lawfully have interfered, on grounds of political expediency; but they were not bound to interfere, as they were now bound to interfere on behalf of Portugal, by the obligations of treaty. War might have been their free choice, if they had deemed it politic, in the case of Spain; interference on behalf of Portugal was their duty, unless they were prepared to abandon the principles of national faith and national honor.[1]

§ 9. Interference of the Christian powers of Europe, in favor of the Greeks.

The interference of the Christian powers of Europe, in favor of the Greeks, who, after enduring ages of cruel oppression, had shaken off the Ottoman yoke, affords a further illustration of the principles of international law authorizing such an interference, not only where the interests and safety of other powers are immediately affected by the internal transactions of a particular State, but where the general interests of humanity are infringed by the excesses of a barbarous and despotic government. These principles are fully recognized in the treaty for the pacification of Greece, concluded at London, on the 6th of July, 1827, between France, Great Britain, and Russia. The preamble of this treaty sets forth, that the three contracting parties were "penetrated with the necessity of putting an end to the sanguinary contest, which, by delivering up the Greek provinces and the isles of the Archipelago to all the disorders of anarchy, produces daily fresh impediments to the commerce of the European States, and gives occasion to piracies, which not only expose the subjects of the

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[1] Mr. Canning's Speech in the House of Commons, 11th December, 1826. Annual Register, vol. lxviii. p. 192.

high contracting parties to considerable losses, but, besides, render necessary burdensome measures of protection and repression." It then states that the British and French governments, having received a pressing request from the Greeks to interpose their mediation with the Porte, and being, as well as the Emperor of Russia, animated by the desire of stopping the effusion of blood, and of arresting the evils of all kinds which might arise from the continuance of such a state of things, had resolved to unite their efforts, and to regulate the operations thereof by a formal treaty, with the view of reëstablishing peace between the contending parties, by means of an arrangement, which was called for as much by humanity as by the interest of the repose of Europe. The treaty then provides, (art. 1,) that the three contracting powers should offer their mediation to the Porte, by a joint declaration of their ambassadors at Constantinople; and that there should be made, at the same time, to the two contending parties, the demand of an immediate armistice, as a preliminary condition indispensable to opening any negotiation. Article 2d provides the terms of the arrangement to be made, as to the civil and political condition of Greece, in consequence of the principles of a previous understanding between Great Britain and Russia. By the 3d article it was agreed, that the details of this arrangement, and the limits of the territory to be included under it, should be settled in a separate negotiation between the high contracting powers and the two contending parties. To this public treaty an additional and secret article was added, stipulating that the high contracting parties would take immediate measures for establishing commercial relations with the Greeks, by sending to them and receiving from them consular agents, so long as there should exist among them authorities capable of maintaining such relations. That if, within the term of one month, the Porte did not accept the proposed armistice, or if the Greeks refused to execute it, the high contracting parties should declare to that one of the two contending parties that should wish to continue hostilities, or to both, if it should become necessary, that the contracting powers intended to exert all the means, which circumstances might suggest to their prudence, to give immediate effect to the armistice, by preventing, as far as might be in their power, all collision between the contending parties. The secret article concluded by declaring, that

if these measures did not suffice to induce the Ottoman Porte to adopt the propositions made by the high contracting powers; or if, on the other hand, the Greeks should renounce the conditions stipulated in their favor, the contracting parties would nevertheless continue to prosecute the work of pacification on the basis agreed upon between them; and, in consequence, they authorized, from that time forward, their representatives in London to discuss and determine the ulterior measures to which it might become necessary to resort.

The Greeks accepted the proffered mediation of the three powers, which the Turks rejected, and instructions were given to the commanders of the allied squadrons to compel the cessation of hostilities. This was effected by the result of the battle of Navarino, with the occupation of the Morea by French troops; and the independence of the Greek State was ultimately recognized by the Ottoman Porte, under the mediation of the contracting powers. If, as some writers have supposed, the Turks belong to a family or set of nations which is not bound by the general international law of Christendom, they have still no right to complain of the measures which the Christian powers thought proper to adopt for the protection of their religious brethren, oppressed by the Mohammedan rule. In a ruder age, the nations of Europe, impelled by a generous and enthusiastic feeling of sympathy, inundated the plains of Asia to recover the holy sepulchre from the possession of infidels, and to deliver the Christian pilgrims from the merciless oppressions practised by the Saracens. The Protestant princes and States of Europe, during the sixteenth and seventeenth centuries, did not scruple to confederate and wage war, in order to secure the freedom of religious worship for the votaries of their faith in the bosom of Catholic communities, to whose subjects it was denied. Still more justifiable was the interference of the Christian powers of Europe to rescue a whole nation, not merely from religious persecution, but from the cruel alternative of being transported from their native land, or exterminated by their merciless oppressors. The rights of human nature wantonly outraged by this cruel warfare, prosecuted for six years against a civilized and Christian people, to whose ancestors mankind are so largely indebted for the blessings of arts and of letters, were but tardily and imperfectly vindicated by this measure. "Whatever," as

Sir James Mackintosh said, "a nation may lawfully defend for itself, it may defend for another people, if called upon to interpose." The interference of the Christian powers, to put an end to this bloody contest might, therefore, have been safely rested upon this ground alone, without appealing to the interests of commerce and of the repose of Europe, which, as well as the interests of humanity, are alluded to in the treaty, as the determining motives of the high contracting parties.[1]

§ 10. Interference of Austria, G. Britain, Prussia, and Russia, in the internal affairs of the Ottoman Empire, in 1840.

We have already seen, that the relations which have prevailed between the Ottoman Empire and the other European States have only recently brought the former within the pale of that public law by which the latter are governed, and which was originally founded on that community of manners, institutions, and religion, which distinguish the nations of Christendom from those of the Mohammedan world.[2] Yet the integrity and independence of that empire have been considered essential to the general balance of power, ever since the crescent ceased to be an object of dread to the western nations of Europe. The above-mentioned interference of three of the great Christian powers in the affairs of Greece had been complicated, by the separate war between Russia and the Ottoman Empire, which was terminated by the Treaty of Adrianople, in 1829, followed by the treaty of alliance between the two empires, of Unkiar-Skelessi, in 1833. The *casus fœderis* of the latter treaty was brought on by the attempts of Mehemet Ali, Pasha of Egypt, to assert his independence, and of the Porte, which sought to recover its lost provinces. The *status quo*, which had been established between the Sultan and his vassal by the arrangement of Kutayah, in 1833, under the mediation of France and Great Britain, on which the peace of the Levant depended, and with it the peace

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[1] Another treaty was concluded at London, between the same three powers, on the 7th of May, 1832, by which the election of Prince Otho of Bavaria, as King of Greece, was confirmed, and the sovereignty and independence of the new kingdom guaranteed by the contracting parties, according to the terms of the protocol signed by them on the 3d of February, 1830, and accepted by Greece and the Ottoman Porte.

[2] Vide supra, Part I. ch. i. § 10.

of Europe was supposed to depend, was thus constantly threatened by the irreconcilable pretensions of the two great divisions of the Ottoman Empire. The war again broke out between them in 1839, and the Turkish army was overthrown in the decisive battle of Nezib, which was followed by the desertion of the fleet to Mehemet Ali, and by the death of Sultan Mahmoud II.

In this state of things, the western powers of Europe thought they perceived the necessity of interfering to save the Ottoman Empire from the double danger with which it was threatened; by the aggressions of the Pasha of Egypt on one side, and the exclusive protectorate of Russia on the other. A long and intricate negotiation ensued between the five great European powers, from the voluminous documents relating to which the following general principles may be collected, as having received the formal assent of all the parties to the negotiations, however divergent might be their respective views as to the application of those principles.

1. The right of the five great European powers to interfere in this contest was placed upon the ground of its threatening, in its consequences, the general balance of power and the peace of Europe. The only difference of opinion arose as to the means by which the desirable end of preventing all future conflict between the two contending parties could best be accomplished.

2. It was agreed that this interference could only take place on the formal application of the Sultan himself, according to the rule laid down by the Congress of Aix-la-Chapelle, in 1818, that the five great powers would never assume jurisdiction over questions concerning the rights and interests of another power, except at its request, and without inviting such power to take part in the conference.

3. The death of Sultan Mahmoud being imminent, and the dangers of the Ottoman Empire having increased by a complication of disasters, each of the five powers declared its determination to maintain the independence of that empire, under the reigning dynasty; and as a necessary consequence of this determination, that neither of them should seek to profit by the present state of things to obtain an increase of territory or an exclusive influence.

The negotiations finally resulted in the conclusion of the con-

vention of the 15th July, 1840, between four of the great European powers, Austria, Great Britain, Prussia, and Russia, to which the Ottoman Porte acceded, and in consequence of which Mehemet Ali was compelled to relinquish the possession of all the provinces held by him, except Egypt, the hereditary pachalic of which was confirmed to him, according to the conditions contained in the separate article of the convention.[1]

§ 11. Interference of the five great European powers in the Belgic revolution of 1830.

The interference of the five great European powers represented in the conference of London, in the Belgic Revolution of 1830, affords an example of the application of this right to preserve the general peace, and to adapt the new order of things to the stipulations of the treaties of Paris and Vienna, by which the kingdom of the Netherlands had been created. We have given, in another work, a full account of the long and intricate negotiations relating to the separation of Belgium from Holland, which assumed alternately the character of a pacific mediation and of an armed intervention, according to the varying circumstances of the contest, and which was finally terminated by a compromise between the two great opposite principles which so long threatened to disturb the established order and general peace of Europe. The Belgic Revolution was recognized as an accomplished fact, whilst its legal consequences were limited within the strictest bounds, by refusing to Belgium the attributes of the rights of conquest and of postliminy, and by depriving her of a great part of the province of Luxembourg, of the left bank of the Scheldt, and of the right bank of the Meuse. The five great powers, representing Europe, consented to the separation of Belgium from Holland, and admitted the former among the independent States of Europe, upon conditions which were accepted by her and have become the bases of her public law. These conditions were subsequently incorporated into a definitive treaty, concluded between Belgium and Holland in 1839, by which the independence of the former was finally recognized by the latter.[2]

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[1] Wheaton's Hist. of the Law of Nations, pp. 563–583, [and note b, p. 21.]

[2] Ibid. pp. 538–555.

§ 12. Independence of the State in respect to its internal government.

Every State, as a distinct moral being, independent of every other, may freely exercise all its sovereign rights in any manner not inconsistent with the equal rights of other States. Among these is that of establishing, altering, or abolishing its own municipal constitution of government. No foreign State can lawfully interfere with the exercise of this right, unless such interference is authorized by some special compact, or by such a clear case of necessity as immediately affects its own independence, freedom, and security. Non-interference is the general rule, to which cases of justifiable interference form exceptions limited by the necessity of each particular case.

§ 13. Mediation of foreign States for the settlement of the internal dissentions of a State. Treaties of mediation and guaranty.

The approved usage of nations authorizes the proposal by one State of its good offices or mediation for the settlement of the intestine dissensions of another State. When such offer is accepted by the contending parties, it becomes a just title for the interference of the mediating power. (*a*)

Such a title may also grow out of positive compact previously existing, such as treaties of mediation and guaranty. Of this nature was the guaranty by France and Sweden of the Germanic Constitution at the peace of Westphalia in 1648, the result of the thirty years' war waged by the princes and States of Germany for the preservation of their civil and religious liberties against the ambition of the House of Austria.

The Republic of Geneva was connected by an ancient alliance

(*a*) [The difference between a mediator and an arbitrator consists in this: that the arbitrator pronounces a real judgment, which is obligatory, and that the mediator can only give his counsel and advice. The mediation, indeed, is often a simple formality to bring the parties together, and which is afterwards continued from respect to the mediator. Garden, Traité de la Diplomatie, tom. i. p. 436, note. The references, by treaty, of 1827, of the question respecting the north-east boundary of the United States by the British and American governments, to the King of the Netherlands, was a case of arbitration, though as the award did not profess to follow the submission, but merely recommended a conventional line, which it designated, it was not obligatory. Amer. Ann. Reg. 1830–1, p. 146.]

with the Swiss Cantons of Berne and Zurich, in consequence of which they united with France, in 1738, in offering the joint mediation of the three powers to the contending political parties by which the tranquillity of the republic was disturbed. The result of this mediation was the settlement of a constitution, which giving rise to new disputes in 1768, they were again adjusted by the intervention of the mediating powers. In 1782, the French government once more united with these Cantons and the court of Sardinia in mediating between the aristocratic and democratic parties; but it appears to be very questionable how far these transactions, especially the last, can be reconciled with the respect due, on the strict principles of international law, to the just rights and independence of the smallest, not less than to those of the greatest States.[1]

The present constitution of the Swiss Confederation was also adjusted, in 1813, by the mediation of the great allied powers, and subsequently recognized by them at the Congress of Vienna as the basis of the federative compact of Switzerland. By the same act the united Swiss Cantons guarantee their respective local constitutions of government.[2]

So also the local constitutions of the different States composing the Germanic Confederation may be guaranteed by the Diet on the application of the particular State in which the constitution is established; and this guarantee gives the Diet the right of determining all controversies respecting the interpretation and execution of the constitution thus established and guaranteed.[3]

And the Constitution of the United States of America guarantees to each State of the federal Union a republican form of government, and engages to protect each of them against invasion, and, on application of the local authorities, against domestic violence.[4]

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[1] Flassan, Histoire de la Diplomatie Française, tom. v. p. 78, tom. vii. pp. 27, 297.

[2] Acte Final du Congrès de Vienne, art. 74.

[3] Wiener Schluss-Acte, vom 15 Mai, 1820, art. 62. Corpus Juris Germanici, von Mayer, tom. ii. p. 196.

[4] Constitution of the United States, art. 3.

§ 15. Independence of every State in respect to the choice of its rulers.

This perfect independence of every sovereign State, in respect to its political institutions, extends to the choice of the supreme magistrate and other rulers, as well as to the form of government itself. In hereditary governments, the succession to the crown being regulated by the fundamental laws, all disputes respecting the succession are rightfully settled by the nation itself, independently of the interference or control of foreign powers. So also in elective governments, the choice of the chief or other magistrates ought to be freely made, in the manner prescribed by the constitution of the State, without the intervention of any foreign influence or authority.[1]

§ 16. Exceptions growing out of compact or other just right of intervention.

The only exceptions to the application of these general rules arise out of compact, such as treaties of alliance, guarantee, and mediation, to which the State itself whose concerns are in question has become a party; or formed by other powers in the exercise of a supposed right of intervention growing out of a necessity involving their own particular security, or some contingent danger affecting the general security of nations. Such, among others, were the wars relating to the Spanish succession, in the beginning of the eighteenth century, and to the Bavarian and Austrian successions, in the latter part of the same century. The history of modern Europe also affords many other examples of the actual interference of foreign powers in the choice of the sovereign or chief magistrate of those States where the choice was constitutionally determined by popular election, or by an elective council, such as in the cases of the head of the Germanic Empire, the King of Poland, and the Roman pontiff; but in these cases no argument can be drawn from the fact to the right. In the particular case, however, of the election of the pope, who is the supreme pontiff of the Roman Catholic Church, as well as a temporal sovereign, the Emperor of Austria, and the Kings of France and Spain have, by ancient usage, each a right to exclude one candidate.[1]

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1 Vattel, Droit des Gens, liv. i. ch. 5, §§ 66, 67.

2 Klüber, Droit des Gens moderne de l'Europe, Pt. II. tit. 1, ch. 2, § 48.

§ 16. Quadruple alliance of 1834, between France, Great Britain, Portugal, and Spain.

The quadruple alliance, concluded in 1834 between France, Great Britain, Spain, and Portugal, affords a remarkable example of actual interference in the questions relating to the succession to the crown in the two latter kingdoms, growing out of compacts to which they were parties, formed in the exercise of a supposed right of interference for the preservation of the peace of the Peninsula as well as the general peace of Europe. Having already stated in another work the historical circumstances which gave rise to the quadruple alliance, as well as its terms and conditions, it will only be necessary here to recapitulate the leading principles, which may be collected from the debate in the British Parliament, in 1835, upon the measures adopted by the British Government to carry into effect the stipulations of the treaty.

1. The legality of the order in council permitting British subjects to engage in the military service of the Queen of Spain, by exempting them from the general operation of the act of Parliament of 1819, forbidding them from enlisting in foreign military service, was not called in question by Sir Robert Peel and the other speakers on the part of the opposition. Nor was the obligation of the treaty of quadruple alliance, by which the British government was bound to furnish arms and the aid of a naval force to the Queen of Spain, denied by them. Yet it was asserted, that without a declaration of war, it would be with the greatest difficulty that the special obligation of giving naval aid could be fulfilled, without placing the force of such a compact in opposition to the general binding nature of international law. Whatever might be the special obligation imposed on Great Britain by the treaty, it could not warrant her in preventing a neutral State from receiving a supply of arms. She had no right, without a positive declaration of war, to stop the ships of a neutral country on the high seas.

2. It was contended that the suspension of the foreign enlistment law was equivalent to a direct military interference in the domestic affairs of another nation. The general rule on which Great Britain had hitherto acted was that of non-interference. The only exceptions admitted to this rule were cases where the necessity was urgent and immediate; affecting, either on account of vicinage, or some special circumstances, the safety or vital

interests of the State. To interfere on the vague ground that British interests would be promoted by the intervention; on the plea that it would be for their advantage to see established a particular form of government in Spain, would be to destroy altogether the general rule of non-intervention, and to place the independence of every weak power at the mercy of its formidable neighbors. It was impossible to deny that an act which the British government permitted, authorizing British soldiers and subjects to enlist in the service of a foreign power, and allowing them to be organized in Great Britain, was a recognition of the doctrine of the propriety of assisting by a military force a foreign government against an insurrection of its own subjects. When the Foreign Enlistment Bill was under consideration in the House of Commons, the particular clause which empowered the king in council to suspend its operation was objected to on the ground, that if there was no foreign enlistment act, the subjects of Great Britain might volunteer in the service of another country, and there could be no particular ground of complaint against them; but that if the king in council were permitted to issue an order suspending the law with reference to any belligerent nation, the government might be considered as sending a force under its own control.

Lord Palmerston, in reply, stated: — 1. That the object of the treaty of quadruple alliance, as expressed in the preamble, was to establish internal peace throughout the Peninsula, including Spain as well as Portugal; the means by which it was proposed to effect that object was the expulsion of the infants Don Carlos and Dom Miguel from Portugal. When Don Carlos returned to Spain, it was thought necessary to frame additional articles to the treaty in order to meet the new emergency. One of these additional articles engaged His Britannic Majesty to furnish Her Catholic Majesty with such supplies of arms and warlike stores as Her Majesty might require, and further to assist Her Majesty with a naval force. The writers on the law of nations all agreed that any government, thus stipulating to furnish arms to another, must be considered as taking an active part in any contest in which the latter might be engaged; and the agreement to furnish a naval force, if necessary, was a still stronger demonstration to that effect. If, therefore, the recent order in council was objected to on the ground that it identified Great Britain with the cause

of the existing government of Spain, the answer was, that, by the additional articles of the quadruple treaty, that identification had already been established, and that one of those articles went even beyond the measure which had been impugned.

2. As to what had been alleged as to the danger of establishing a precedent for the interference of other countries, he would merely observe; that in the first place this interference was founded on a treaty arising out of the acknowledged right of succession of a sovereign, decided by the legitimate authorities of the country over which she ruled. In the case of a civil war proceeding either from a disputed succession, or from a prolonged revolt, no writer on international law denied that other countries had a right, if they chose to exercise it, to take part with either of the two belligerent parties. Undoubtedly it was inexpedient to exercise that right except under circumstances of a peculiar nature. That right, however, was general. If one country exercised it, another might equally exercise it. One State might support one party, another the other party; and whoever embarked in either cause must do so with their eyes open to the full extent of the possible consequences of their decision. He contended, therefore, that the measure under consideration established no new principle, and that it created no danger as a precedent. Every case must be judged by the considerations of prudence which belonged to it. The present case, therefore, must be judged by similar considerations. All that he maintained was, that the recent proceeding did not go beyond the spirit of the engagement into which Great Britain had entered, that it did not establish any new principle, and that the engagement was quite consistent with the law of nations.[1]

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[1] Wheaton's Hist. Law of Nations, pp. 523–538

CHAPTER II.

RIGHTS OF CIVIL AND CRIMINAL LEGISLATION.

§ 1. Exclusive power of civil legislation.

EVERY independent State is entitled to the exclusive power of legislation, in respect to the personal rights and civil state and condition of its citizens, and in respect to all real and personal property situated within its territory, whether belonging to citizens or aliens. But as it often happens that an individual possesses real property in a State other than that of his domicile, or that contracts are entered into and testaments executed by him in a country different from either, or that he is interested in successions *ab intestato*, in such third country; it may happen that he is, at the same time, subject to two or three sovereign powers — to that of his native country or of his domicile, to that of the place where the property in question is situated, and to that of the place where the contracts have been made or the acts executed. The allegiance to the sovereign power of his native country exists from the birth of the individual, and continues till a change of nationality. In the two other cases he is considered subject to the laws, but only in a limited sense. In the foreign countries, where he possesses real property, he is called a non-resident land owner, (*sujet forain;*) in those in which the contracts are entered into, a temporary resident, (*sujet passager*). As, in general, each of these different countries is governed by a distinct legislation, conflicts between their laws often arise; that is to say, it is frequently a question which system of laws is applicable to the case. The collection of rules for determining the conflicts between the civil and criminal laws of different States, is called private international law, to distinguish it from public international law, which regulates the relations of States.[1]

Private international law.

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[1] Fœlix, Droit International Privé, § 3.

§ 2. Conflict of laws.

The first general principle on this subject results immediately from the fact of the independence of nations. Every nation possesses and exercises exclusive sovereignty and jurisdiction throughout the full extent of its territory. It follows, from this principle, that the laws of every State control, of right, all the real and personal property within its territory, as well as the inhabitants of the territory, whether born there or not, and that they affect and regulate all the acts done, or contracts entered into within its limits.

Consequently, "every State possesses the power of regulating the conditions on which the real or personal property, within its territory, may be held or transmitted; and of determining the state and capacity of all persons therein, as well as the validity of the contracts and other acts which arise there, and the rights and obligations which result from them; and, finally, of prescribing the conditions on which suits at law may be commenced and carried on within its territory."[1]

The second general principle is, "that no State can, by its laws, directly affect, bind, or regulate property beyond its own territory, or control persons who do not reside within it, whether they be native-born subjects or not. This is a consequence of the first general principle; a different system, which would recognize in each State the power of regulating persons or things beyond its territory, would exclude the equality of rights among different States, and the exclusive sovereignty which belongs to each of them."[2]

From the two principles, which have been stated, it follows that all the effect, which foreign laws can have in the territory of a State, depends absolutely on the express or tacit consent of that State. A State is not obliged to allow the application of foreign laws within its territory, but may absolutely refuse to give any effect to them. It may pronounce this prohibition with regard to some of them only, and permit others to be operative, in whole or in part. If the legislation of the State is positive either way, the tribunals must necessarily conform to it. In the event only of the law being silent, the courts may judge, in the particular cases, how far to follow the foreign laws, and to apply their provisions. The express consent of a State,

[1] Fœlix, Droit International Privé, § 9. [2] Id. § 10.

to the application of foreign laws within its territory, is given by acts passed by its legislative authority, or by treaties concluded with other States. Its tacit consent is manifested by the decisions of its judicial and administrative authorities, as well as by the writings of its publicists.

There is no obligation, recognized by legislators, public authorities, and publicists, to regard foreign laws; but their application is admitted, only from considerations of utility and the mutual convenience of States — *ex comitate, ob reciprocam utilitatem.* The public good and the general interests of nations have caused to be accorded, in every State, an operation more or less extended to foreign laws. Every nation has found its advantage in this course. The subjects of every State have various relations with those of other States; they are interested in the business transacted and in the property situate abroad. Thence flows the necessity, or at least utility, for every State, in the proper interest of its subjects, to accord certain effects to foreign laws, and to acknowledge the validity of acts done in foreign countries, in order that its subjects may find in the same countries a reciprocal protection for their interests. There is thus formed a tacit convention among nations for the application of foreign laws, founded upon reciprocal wants. This understanding is not the same everywhere. Some States have adopted the principle of complete reciprocity, by treating foreigners in the same manner as their subjects are treated in the country to which they belong; other States regard certain rights to be so absolutely inherent in the quality of citizens as to exclude foreigners from them; or they attach such an importance to some of their institutions, that they refuse the application of every foreign law incompatible with the spirit of those institutions. But, in modern times, all States have adopted, as a principle, the application within their territories of foreign laws; subject, however, to the restrictions which the rights of sovereignty and the interests of their own subjects require. This is the doctrine professed by all the publicists who have written on the subject.

"Above all things," says President Bohier, "we must remember that, though the strict rule would authorize us to confine the operation of laws within their own territorial limits, their application has, nevertheless, been extended, from considerations of public utility, and oftentimes even from a kind of necessity. But, when neigh-

boring nations have permitted this extension, they are not to be deemed to have subjected themselves to a foreign statute; but to have allowed it, only because they have found in it their own interest by having, in similar cases, the same advantages for their own laws among their neighbors. This effect given to foreign laws is founded on a kind of comity of the law of nations; by which different peoples have tacitly agreed that they shall apply, whenever it is required by equity and common utility, provided they do not contravene any prohibitory enactment."[1]

Huberus, one of the earliest and best writers on this subject, lays down the following general maxims, as adequate to solve all the intricate questions which may arise respecting it: —

1. The laws of every State have force within the limits of that State, and bind all its subjects.

2. All persons within the limits of a State are considered as subjects, whether their residence is permanent or temporary.

3. By the comity of nations, whatever laws are carried into execution within the limits of any State, are considered as having the same effect everywhere, so far as they do not occasion a prejudice to the rights of other States and their citizens.

From these maxims, Huberus deduces the following general corollary, as applicable to the determination of all questions arising out of the conflict of the laws of different States, in respect to private rights of persons and property.

All transactions in a court of justice, or out of court, whether testamentary or other conveyances, which are regularly done or executed according to the law of any particular place, are valid, even where a different law prevails, and where, had they been so transacted, they would not have been valid. On the other hand, transactions and instruments which are done or executed contrary to the laws of a country, as they are void at first, never can be valid; and this applies not only to those who permanently reside in the place where the transaction or instrument is done or executed, but to those who reside there only temporarily; with this exception only, that if another State, or its citizens, would be affected by any peculiar inconvenience of an important nature, by giving this effect to acts performed in another country, that State is not bound to give effect to those

[1] Bohier, Observations sur la coutume de Bourgogne, ch. 23, §§ 62, 63, p. 457.

proceedings, or to consider them as valid within its jurisdiction.[1] (*a*)

§ 3. Lex loci rei sitæ.

Thus, real property is considered as not depending altogether upon the will of private individuals, but as having certain qualities impressed upon it by the laws of that country where it is situated, and which qualities remain indelible, whatever the laws of another State, or the private dispositions of its citizens, may provide to the contrary. That State, where this real property is situated, cannot suffer its own laws in this respect to be changed by these dispositions, without great confusion and prejudice to its own interests. Hence it follows, that the law of a place where real property is situated governs exclusively as to the tenure, the title, and the descent of such property.[2]

This rule is applied, by the international jurisprudence of the United States and Great Britain, to the forms of conveyance of real property, both as between different parts of the same con-

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[1] Huberus, Prælect. tom. ii. lib. i. tit. 3, de Conflictu Legum.

(*a*) [*Commissions Rogatoires*, by which testimony is obtained for the courts of one country, through the instrumentality of foreign tribunals, are very usual in the different States of Europe. It is only the English and American judges that do not resort to them. In the case of proceedings in the courts of those countries, requiring proof from abroad, a commission to take the testimony is addressed to one or more individuals, in the place where the testimony is to be obtained, authorizing them to examine the witnesses on oath, on interrogatories sent to them. This examination is, however, necessarily voluntary on the part of the witnesses; as is also the acceptance of the duties of the commission, by the persons named in it. Moreover, the magistrates of the place may object to the execution of the commission, as an infringement on the exclusive judicial power which belongs to every State, throughout the whole extent of its territory. See Fœlix, Droit International Privé, § 185.]

[2] "Fundamentum universæ hujus doctrinæ diximus esse, et tenemus, subjectionem hominum infra leges cujusque territorii, quamdiu illic agunt, quæ facit ut actus ab initio validus aut nullus, alibi quoque valere aut non valere non nequeat. Sed hæc ratio non convenit rebus immobilibus, quando illæ spectantur, non ut dependentes à liberâ dispositione cujusque patris-familias, verum quatenus certæ notæ lege cujusque reipublicæ ubi sitæ sunt, illis impressæ reperiuntur; hæ notæ manent indelebiles in istâ republica, quidquid aliarum civitatum leges, aut privatorum dispositiones, secus aut contra statuant; nec enim sine magnâ confusione prejudicioque reipublicæ ubi sitæ sunt res soli, leges de illis latæ, dispositionibus istis mutari possunt." Huberus, liv. i. tit. 3. de Conflictu Leg. § 15.

federation or empire, and with respect to foreign countries. Hence it is that a deed or will of real property, executed in a foreign country, or in another State of the Union, must be executed with the formalities required by the laws of that State where the land lies.[1]

But this application of the rule is peculiar to American and British law. According to the international jurisprudence recognized among the different nations of the European continent, a deed or will, executed according to the law of the place where it is made, is valid; not only as to personal, but as to real property, wherever situated; provided the property is allowed by the *lex loci rei sitæ* to be alienated by deed or will; and those cases excepted, where that law prescribes, as to instruments for the transfer of real property, particular forms, which can only be observed in the place where it is situated, such as the registry of a deed or the probate of a will.[2]

§ 4. Droit d'aubaine.

The municipal laws of all European countries formerly prohibited aliens from holding real property within the territory of the State. During the prevalence of the feudal system, the acquisition of property in land involved the notion of allegiance to the prince within whose dominions it lay, which might be inconsistent with that which the proprietor owed to his native sovereign. It was also during the same rude ages that the *jus albinagii* or *droit d'aubaine* was established; by which all the property of a deceased foreigner (movable and immovable,) was confiscated to the use of the State, to the exclusion of his heirs, whether claiming *ab intestato*, or under a will of the dece-

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[1] Wheaton's Rep. vol. iii. p. 212. — Robinson *v.* Campbell. Cranch's Rep. vol. vii. p. 115. United States *v.* Crosby.

[2] Fœlix, Droit International Privé, § 52. "Hinc Frisius habens agros et domos in provinciâ Groningensi, non potest de illis testari, quia lege prohibitum est ibi de bonis immobilibus testari, non valente jure Frisico adficere bona, quæ partes alieni territorii integrantes constituunt. Sed an hoc non obstat ei, quod antea diximus, si factum sit testamentum jure loci validum, id effectum habere etiam in bonis alibi sitis, ubi de illis testari licet? Non obstat; quia legum diversitas in illâ specie non afficit res soli, neque de illis loquitur, sed ordinat actum testandi; quo recte celebrato, lex Reipublicæ non vetat illum actum valere in immobilibus, quatenus nullus character illis ipsis a lege loci impressus lædit aut imminuitur." Huberus, ubi supra.

dent.[1] In the progress of civilization, this barbarous and inhospitable usage has been, by degrees, almost entirely abolished. This improvement has been accomplished either by municipal regulations, or by international compacts founded upon the basis of reciprocity. Previous to the French Revolution of 1789, the *droit d'aubaine* had been either abolished or modified, by treaties between France and other States; and it was entirely abrogated by a decree of the Constituent Assembly, in 1791, with respect to all nations, without exception and without regard to reciprocity. This gratuitous concession was retracted, and the subject placed on its original footing of reciprocity by the Code-Napoleon, in 1803; but this part of the Civil Code was again repealed, by the Ordinance of the 14th July, 1819, admitting foreigners to the right of possessing both real and personal property in France, and of taking by succession *ab intestato*, or by will, in the same manner with native subjects.[2]

The analogous usage of the *droit de détraction*, or *droit de retraite*, (jus detractûs) by which a tax was levied upon the removal from one State to another of property acquired by succession or testamentary disposition, has also been reciprocally abolished in most civilized countries.

The stipulations contained in the treaties of 1778 and 1801, between the United States and France, for the mutual abolition of the *droit d'aubaine* and the *droit de détraction* between the two countries, have expired with those treaties; and the provision in the treaty of 1794, between the United States and Great Britain, by which the citizens and subjects of the two countries, who then held lands within their respective territories, were to continue to hold them according to the nature and tenure of their respective estates and titles therein, was limited to titles existing at the signature of the treaty, and is rapidly becoming obsolete by the

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1 Du Cange (Gloss. Med. Ævi, voce *Albinagium* et *Albani*) derives the term from *advenæ*. Other etymologists derive it from *alibi natus*. During the Middle Age, the Scots were called *Albani* in France, in common with all other aliens; and as the Gothic term *Albanach* is even now applied by the Highlanders of Scotland to their race, it may have been transferred by the continental nations to all foreigners.

2 Rotteck et Welcker, Staats-Lexicon, art. *Gastrecht*, Band. 6, § 362. Vattel, liv. ii. ch. viii. §§ 112–114. Klüber, Droit des Gens, Pt. II. tit. 1, ch. ii. §§ 32, 33. Von Mayer, Corp. Jur. Confæd. Germanicæ, tom. ii. p. 17. Merlin, Repertoire, tit. *Aubaine*.

lapse of time.[1] But by the stipulations contained in a great number of subsisting treaties, between the United States and various powers of Europe and America, it is provided, that "where on the death of any person holding real estate within the territories of the one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all duties of *détraction* on the part of the government of the respective States."[2]

§ 5. Lex domicilii.

As to personal property, the *lex domicilii* of its owner prevails over the law of the country where such pro-

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[1] Kent's Comm. on Am. Law, vol. ii. pp. 67–69. 5th edit.

[2] Treaty of 1828, between the U. S. and Prussia, art. 14. Elliot's Am. Diplom. Code, vol. i. p. 388. [See also, for the same or similar provisions, the Convention of the United States with the Hanseatic Republics, of 1827, art. 7, U. S. Stat. at Large, vol. 8, p. 370; with Austria, of 1829, art. 11, id. p. 400; also the convention with Austria, 1848, art. 11, id. vol. 9, p. 445; with Brazil, of 1828, art. 11, id. vol. 8, p. 392; with Mexico, of 1831, art. 13, id. vol. 8, p. 414; with Russia, of 1832, art. 10, id. vol. 8, p. 448; with the Two Sicilies, of 1845, art. 6, id. vol. 9, p. 836; with Chili, of 1832, art. 9, vol. 8, p. 435; with Venezuela, of 1836, art. 2, id. vol. 8, p. 470; with Peru-Bolivia, of 1836, art. 8, id. vol. 8, p. 489; with Sardinia, of 1838, art. 18, id. vol. 8, p. 520; with Hanover, of 1840, (concluded by Mr. Wheaton,) art. 7, id. vol. 8, p. 556; and the Convention of Hanover, of 1846, (concluded by Mr. Mann,) art. 10, vol. 9, p. 865. This last convention contains an article, by which its advantages may be extended to other States of the Germanic Confederation, provided they confer similar favors upon the United States to those accorded by the Kingdom of Hanover. Under this provision, Oldenburg acceded, on the 10th of March, 1847, id. vol. ix. p. 868, and Mecklenberg-Schwerin, on 9th December, 1847, id. vol. ix. p. 910. See also treaty with Ecuador of 1839, art. 12, id. vol. 8, p. 538; the conventions with Wurtemberg of 1844, id. vol. 8. p. 588; of Hesse Cassell of 1844, id. vol. 9, p. 818; of Saxony of 1845, id. vol. 9, p. 830; of Nassau of 1846, id. vol. 9, p. 849; of Bavaria of 1845, id. vol. 9, p. 827. The five last conventions were concluded at Berlin, by Mr. Wheaton; each of them is entitled "A Convention for the Mutual Abolition of the Droit d'Aubaine and taxes on Emigration," to which subjects they exclusively relate. The treaty with France, of 23d February, 1853, art. 7, *vide infra*, contains a provision, authorizing Frenchmen in all the States of the Union, whose existing laws permit it, to hold personal and real property by the same tenure and in the same manner as citizens of the United States, and an engagement of the President to recommend to the other States the passage of laws necessary for that purpose. France accords to American citizens the same privileges within her territory, with the reservation of the ulterior right of establishing reciprocity.]

perty is situated, so far as respects the rule of inheritance: — *Mobilia ossibus inhærent, personam sequuntur.* Thus the law of the place, where the owner of personal property was domiciled at the time of his decease, governs the succession *ab intestato* as to his personal effects wherever they may be situated.[1] Yet it had once been doubted, how far a British subject could, by changing his native domicile for a foreign domicile without the British empire, change the rule of succession to his personal property in Great Britain; though it was admitted that a change of domicile, within the empire, as from England to Scotland, would have that effect.[2] But these doubts have been overruled in a more recent decision, by the Court of Delegates in England establishing the law, that the actual foreign domicile of a British subject is exclusively to govern, in respect to his testamentary disposition of personal property, as it would in the case of a mere foreigner.[3]

So also the law of a place where any instrument, relating to personal property, is executed, by a party domiciled in that place, governs, as to the external form, the interpretation, and the effect of the instrument: *Locus regit actum.* Thus a testament of personal property, if executed according to the formalities required by the law of the place where it is made, and where the party making it was domiciled at the time of its execution, is valid in every other country, and is to be interpreted and given effect to according to the *lex loci.*

This principle, laid down by all the text-writers, was recently recognized in England in a case where a native of Scotland, domiciled in India, but who possessed heritable bonds in Scotland, as well as personal property there, and also in India, having executed a will in India, ineffectual to convey Scottish heritage; and a question having arisen whether his heir at law (who

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[1] Huberus, Prælect., tom. ii. lib. i. tit. 3, de Conflict. Leg. §§ 14, 15. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 16. See also an opinion given by Grotius as counsel in 1613, Henry's Foreign Law, App'x, p. 196. Merlin, Répertoire, tit. Loi, § 6, No. 3. Fœlix, Droit International Privé, § 37.

[2] Per Sir J. Nicholl, in Curling *v.* Thornton, Addams' Eccles. Rep. vol. ii. p. 17.

[3] Stanley *v.* Bernes, Haggard. Eccles. Rep. vol. iii. pp. 393–465. Moore *v.* Davell, vol. iv. pp. 346, 354.

claimed the heritable bonds as heir) was also entitled to a share of the movable property as legatee under the will: It was held by Lord Chancellor Brougham, in delivering the judgment of the House of Lords affirming that of the court below, that the construction of the will, and the legal consequences of that construction, must be determined by the law of the land where it was made, and where the testator had his domicile, that is to say, by the law of England prevailing in that country; and this, although the will was made the subject of judicial inquiry in the tribunals of Scotland; for these courts also are bound to decide according to the law of the place where the will was made.[1]

§ 6. Personal status.

The sovereign power of municipal legislation also extends to the regulation of the personal rights of the citizens of the State, and to every thing affecting their civil state and condition.

It extends (with certain exceptions) to the supreme police over all persons within the territory, whether citizens or not, and to all criminal offences committed by them within the same.[2]

Some of these exceptions arise from the positive law of nations, others are the effect of special compact.

There are also certain cases where the municipal laws of the State, civil and criminal, operate beyond its territorial jurisdiction. These are,

I. Laws relating to the state and capacity of persons.

Laws relating to the state and capacity of persons may operate extra-territorially.

In general, the laws of the State, applicable to the civil condition and personal capacity of its citizens, operate upon them even when resident in a foreign country.

Such are those universal personal qualities which take effect either from birth, such as citizenship, legitimacy, and illegitimacy; at a fixed time after birth, as minority and majority; or at an indeterminate time after birth, as idiocy and lunacy, bank-

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[1] Trotter *v.* Trotter, Wilson and Shaw's Rep. vol. iii, pp. 407–414.

[2] "Leges cujusque imperii vim habent intra terminos ejusdem reipublicæ. omnesque ei subjectos obligant, nec ultra. Pro subjectis imperio habendi sunt omnes, qui intra terminos ejusdem reperiuntur, sive in perpetuum, sive ad tempus ibi commorentur." (Huberus, tom. ii. liv. i. tit. 3, de Conflict. Leg. § 2.)

ruptcy, marriage, and divorce, ascertained by the judgment of a competent tribunal. The laws of the State affecting all these personal qualities of its subjects travel with them wherever they go, and attach to them in whatever country they are resident.[1]

This general rule is, however, subject to the following exceptions:

Naturalization.

1. To the right of every independent sovereign State to naturalize foreigners and to confer upon them the privileges of their acquired domicile. (*a*)

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[1] Pardessus, Droit Commercial, Pt. VI. tit. 7, ch. 2, § 1. Fœlix, Droit International Privé, liv. i. tit. 1, § 31. "Qualitates personales certo loco alicui jure impressas, ubique circumferri et personam comitari, cum hoc effectu, ut ubivis locorum eo jure, quo tales personæ alibi gaudent vel subjecti sunt, fruantur et subjiciantur." Huberus, tom. ii. l. i. tit. 3, de Conflict, Leg. § 12.

(*a*) [Distinct from the implied national character, arising from domicile, and which may exist for commercial purposes without a person ceasing to be bound by his allegiance to the country of his birth or adoption, all the countries of Christendom, with more or less restrictions, accord the rights of naturalization to foreigners. England was the only country where an act of the legislature was necessary in each particular case. There, even in acts of Parliament, the Stat. 1 Geo. 1, c. 4, required the insertion of a clause, excluding the party from being a privy counsellor, sitting in either house of Parliament, or holding any civil or military office; but since 1844, (7 and 8 Vict. c. 66,) that provision is repealed, and aliens may now be naturalized, by presenting a petition to one of the principal Secretaries of State; and it is not necessary to go to Parliament, except for the purpose of obtaining the political privileges still inhibited to naturalized aliens by the general law, but to the granting of which, by a special act, there is no longer any impediment. British Statutes at Large, 7 and 8 Vict. p. 392. With regard to expatriation, however, there is not the same accordance of views in the laws of different countries. The doctrine of the publicists is, that whenever a child attains his majority, according to the law of his domicile of origin, he becomes free to change his nationality, and to choose another domicile; and even in the case of the subject of a country, England for example, which refuses the liberty of expatriation, the original tie is preserved only in the interest of the nation to which the individual belonged, and without affecting, with reference to his adopted country, the validity of the naturalization acquired there. Fœlix, Droit International Privé, § 22.

These principles have been recently elucidated in two cases, which commanded the serious consideration of the American government. In one of them it felt bound to recognize the obligations of foreign nationality, voluntarily assumed by one who had been a native born citizen, and not to interpose, on his behalf, the claims of American citizenship, to protect him against the consequences of acts committed against the country of his adoption. In the other, it protected, under

Even supposing a natural-born subject of one country cannot throw off his primitive allegiance, so as to cease to be responsible

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the American flag, when arrested in a country (which was not his domicile of origin) by the functionaries of the sovereign that had expatriated him, a foreigner who, by circumstances, had ceased to owe allegiance to any other country, who had obtained a domicile in the United States, and who had done every thing which our laws permitted to acquire the rights of American citizenship.

The case of John S. Thrasher is thus presented in a report prepared in December, 1851, by Mr. Webster, Secretary of State, in answer to a resolution of the House of Representatives: —

"There is no doubt that John S. Thrasher is a citizen of the United States by birth, nor is there any doubt that he has resided in the island of Cuba for a considerable number of years, engaged in business transactions, sometimes as a merchant, and sometimes as the conductor of a newspaper press; although the precise period and duration of such residence are not known.

"In the letter from the Governor of Cuba to her Catholic Majesty's Minister in the United States, it is stated that he has been not only a resident in Havana for a considerable time, but domiciled there by regular proceedings, and that he has in solemn form sworn allegiance to the Spanish crown.

"There is no evidence in the possession of the government to show what was his purpose with regard to his returning to his native country, at any fixed or definite time. Other members of his family are understood to be, like himself, residents in Cuba — his father having gone to that island some years ago.

"It appears that soon after the failure and breaking up of the late expedition of Narciso Lopez, in the invasion of Cuba by him and the troops under his command, Mr. Thrasher was arrested and tried for high treason or conspiracy against the crown of Spain; condemned to eight years imprisonment to hard labor, and sent to Spain in execution of that sentence.

"The first general question then, is, as to his right to exemption from Spanish law and Spanish authority, on the ground of his being a native-born citizen of the United States.

"The general rule of the public law is, that every person of full age has a right to change his domicile; and it follows, that when he removes to another place, with the intention to make that place his permanent residence, or his residence for an indefinite period, it becomes instantly his place of domicile; and this is so, notwithstanding he may entertain a floating intention of returning to his original residence or citizenship at some future period.

"The Supreme Court of the United States has decided, 'that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes, by these acts, such evidences of an intention permanently to reside in that country, as to stamp him with its national character;' and this, undoubtedly, is in full accordance with the sentiments of the most eminent writers, as well as with those of other high judicial tribunals on the subject. No government has carried this general presumption farther than that of the United

for criminal acts against his native country, it has been determined, both in Great Britain and the United States, that he

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States, since it is well known that hundreds of thousands of persons are now living in this country who have not been naturalized according to the provisions of law, nor sworn any allegiance to this government, nor been domiciled among us by any regular course of proceedings. What degree of alarm would it not give to this vastly numerous class of men, actually living among us as inhabitants of the United States, to learn that, by removing to this country, they had not transferred their allegiance from the governments of which they were originally subjects, to this government? And, on the other hand, what would be the condition of this country and its government, if the sovereigns of Europe, from whose dominions they have emigrated, were supposed to have still a right to interpose to protect such inhabitants against the penalties which might be justly incurred by them, in consequence of their violation of the laws of the United States? In questions on this subject, the chief point to be considered is the *animus manendi*, or intention of continued residence; and this must be decided by reasonable rules and the general principles of evidence.

"If it sufficiently appear, that the intention of removing was to make a permanent settlement, or a settlement for an indefinite time, the right of domicile is acquired by a residence even of a few days.

"It is undoubtedly true, that an American citizen who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own government; and if, without the violation of any municipal law, he should be treated unjustly, he would have a right to claim that protection, and the interposition of the American government in his favor would be considered as a justifiable interposition. But his position is completely changed, when, by his own act he has made himself the subject of a foreign power. And a person found residing in a foreign country is presumed to be there *animo manendi*, or with the purpose of remaining; and to relieve himself of the character which this presumption fixes upon him, he must show that his residence was only temporary, and accompanied all the while with a fixed and definite intention of returning. If in that country, he engages in trade and business, he is considered, by the law of nations, as a merchant of that country; nor is the presumption rebutted by the residence of his wife and family in the country from which he came. This is the doctrine as laid down by the United States courts. And it has been decided that 'a Spanish merchant who came to the United States, and continued to reside here and carry on trade, after the breaking out of war between Spain and Great Britain, is to be considered an American merchant, although the trade could be lawfully carried on by a Spanish subject only.' But the necessity of any presumption in Mr. Thrasher's case is entirely removed, if, in fact, he actually took out letters of domiciliation, in order to enable him to transact business such as a Spanish subject or a domiciliated foreigner can alone transact, and actually swore allegiance to the Spanish crown. . . . .

"But, independently of a residence with intention to continue such residence;

may become by residence and naturalization in a foreign State entitled to all the commercial privileges of his acquired domicile

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independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well known that, by the public law, an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be punished for treason, or other crimes, as a native-born subject might be, unless his case is varied by some treaty stipulations; but this duty of obedience to the laws, arising from local and temporary allegiance, ceases, of course, the moment he transfers himself back to his original country.

"An American citizen, by birth, owing, of course, a native allegiance to the United States, going abroad and obtaining no residence under a foreign government, and professing to such government no allegiance, and who should yet commit acts of hostility or war against this country, would seem to bring himself within the act of Congress which declares, that if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, he or they shall be adjudged guilty of treason. And the reason is plain, since his allegiance in such a case is original and native, and has not been transferred nor lost in any other local allegiance arising from a residence elsewhere, but continues to be the primitive tie which binds him to his country.

"But, as has been already said, every foreigner-born, residing in a country, owes to that country allegiance, and obedience to its laws so long as he remains in it, as a duty imposed upon him by the mere fact of his residence and the temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized States, and nowhere a more established doctrine than in this country. . . .

"Our citizens who resort to countries where the trial by jury is not known, and who may there be charged with crime, frequently imagine, when the laws of those countries are administered in the forms customary therein, that they are deprived of rights to which they are entitled, and therefore may expect the interference of their own government. But it must be remembered, in all such cases, that they have of their own free will elected a residence out of their native land, and preferred to live elsewhere and under another government, and in a country in which different laws prevail.

"They have chosen to settle themselves in a country where jury trials are not known, where representative government does not exist, where the privilege of the writ of *habeas corpus* is unheard of, and where judicial proceedings in criminal cases are brief and summary. Having made this election, they must necessarily abide its consequences. No man can carry the ægis of his national American liberty into a foreign country, and expect to hold it up for his exemption from the dominion and authority of the laws and the sovereign power of that country, unless he be authorized so to do by the virtue of treaty stipulations.

"The definition of crimes — the denouncement of penalties for their commission, and the forms of proceeding by which guilt is to be ascertained, are high pre-

and citizenship. Thus, by the treaty of 1794, between the United States and Great Britain, the trade to the countries

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rogatives of sovereignty, and one nation cannot dictate them to another without being liable to the same dictation herself.

"The friends of Mr. Thrasher interpose in his behalf the seventh article of the treaty of 1795, which declares that in all cases of offences committed by any citizen or subject of the one party within the jurisdiction of the other, the same shall be prosecuted by order and authority of law only, and according to the regular course of proceeding in such cases. They shall also be allowed to employ such advocates as they may judge proper before the tribunal of the other party, who shall have free access to be present at the proceedings in such causes, and at the taking of all examinations and evidence which may be exhibited in the said trials.

"As the public law, however, does in no case impart to foreigners residing in any country privileges which are denied to its own citizens or subjects, except, perhaps, that of leaving the country, it may be thought doubtful, whether by the article of the treaty referred to, the parties could have contemplated any more than to place citizens of the United States, within Spanish jurisdiction, on an equality with Spanish subjects, and Spanish subjects in the United States on an equality with our own citizens in criminal proceedings. . . . .

"But however all this may be, the general question still returns, whether this right, secured by treaty, whatever it is, be not justly limited to such persons as are, at the time, in all respects, American citizens, having never voluntarily changed their domicile, or taken upon themselves a new allegiance.

"In this view of the case, it might therefore be asked whether, if Mr. Thrasher had been a native-born subject of her Catholic Majesty, his trial and its result would have been different from what they actually were.

"If, indeed, Mr. Thrasher, in his arrest and trial, did not enjoy the benefits which native-born Spanish subjects enjoy in like cases, but was more harshly treated or more severely punished, for the reason that he was a native-born citizen of the United States, it would be a clear case of the violation of treaty obligations, and would demand the interposition of the government. There exists in this Department no proof of any such extraordinary treatment of Mr. Thrasher."

In the instructions to the American Minister at Madrid, the release of Mr. Thrasher is claimed not as a right, but is asked as a favor, in common with that of the invaders of Cuba, who, taken in open hostility to the authority of Spain, without the sanction of any organized government, were clearly amenable to her laws, without being entitled to any suggestion in their behalf, except such as humanity might dictate. Cong. Doc. 32 Cong. 1 Sess. H. Rep. Ex. Doc. No. 10.

Martin Koszta's case is thus presented in Mr. Secretary Marcy's note of 26th of September, 1853, in answer to Mr. Hülsemann's of 29th of August, 1853, demanding the consent of the President to Koszta's surrender to the Consul-General of Austria, at Smyrna, and the disavowal of the acts of the American agents, with satisfaction for their alleged outrage, as he terms it.

beyond the Cape of Good Hope, within the limits of the East India Company's charter, was opened to American citizens,

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"Martin Koszta, by birth a Hungarian, and of course an Austrian subject at that time, took an open and active part in the political movement of 1848–49, designed to detach Hungary from the dominion of the Emperor of Austria. At the close of that disastrous revolutionary movement, Koszta, with many others engaged in the same cause, fled from the Austrian dominions, and took refuge in Turkey. The extradition of these fugitives, Koszta among them, was demanded and pressed with great vigor by Austria, but firmly resisted by the Turkish government. They were, however, confined at Kutahia, but at length released, with the understanding or by the express agreement of Austria, that they should leave Turkey and go into foreign parts. Most of them, it is believed, before they obtained their release, indicated the United States as the country of their exile. It is alleged that Koszta left Turkey in company with Kossuth — this is believed to be a mistake; and that he engaged never to return — this is regarded as doubtful. To this sentence of banishment — for such is the true character of their expulsion from Turkey — Austria gave her consent; in truth it was the result of her efforts to procure their extradition, and was accepted by her as a substitute for it. She had agents or commissioners at Kutahia to attend to their embarkation, and to her the legal consequences of this act are the same as if it had been done directly by herself, and not by the agency of the Ottoman Porte. Koszta came to the United States and selected this country for his future home.

"On the 31st of July, 1852, he made a declaration, under oath, before a proper tribunal, of his intention to become a citizen of the United States, and renounce all allegiance to any other state or sovereign.

"After remaining here one year and eleven months, he returned, on account, as is alleged, of private business of a temporary character, to Turkey, in an American vessel, claimed the rights of a naturalized American citizen, and offered to place himself under the protection of the United States Consul at Smyrna. The consul at first hesitated to recognize and receive him as such; but afterwards, and some time before his seizure, he, and the American Charge d'Affaires *ad interim* at Constantinople, did extend protection to him, and furnished him with a *tezkereh* — a kind of passport or letter of safe-conduct, usually given by foreign consuls in Turkey to persons to whom they extend protection, as by Turkish laws they have a right to do. It is important to observe that there is no exception taken to his conduct after his return to Turkey, and that Austria has not alleged that he was there for any political object, or for any other purpose than the transaction of private business. While waiting, as is alleged, for an opportunity to return to the United States, he was seized by a band of lawless men — freely, perhaps harshly, characterized in the despatches as "ruffians," "Greek hirelings," "robbers" — who had not, nor did they pretend to have, any color of authority emanating from Turkey or Austria, treated with violence and cruelty, and thrown into the sea. Immediately thereafter he was taken up by a boat's crew, lying in wait for him, belonging to the Austrian brig-of-war, the Huszar, forced on board that vessel, and there confined in irons. It is now avowed, as it

whilst it still continued prohibited to British subjects: it was held by the Court of King's Bench that a natural-born British

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was then suspected, that these desperadoes were instigated to this outrage by the Austrian Consul-General at Smyrna; but it is not pretended that he acted under the civil authority of Turkey, but, on the contrary, it is admitted that, on application to the Turkish Governor at Smyrna, that magistrate refused to grant the Austrian Consul any authority to arrest Koszta.

"The Consul of the United States at Smyrna, as soon as he heard of the seizure of Koszta, and the Chargé d'Affaires of the United States *ad interim* at Constantinople, afterwards, interceded with the Turkish authorities, with the Austrian Consul-General at Smyrna, and with the commander of the Austrian brig-of-war for his release, on the ground of his American nationality. To support this claim, Koszta's original certificate of having made, under oath, in a court in New York, a declaration of intention to become an American citizen, was produced at Smyrna, and an imperfect copy of it placed in the hands of the imperial Austrian Internuncio, at Constantinople. The application to these officers at Smyrna for his liberation, as well as that of Mr. Brown, our Chargé d'Affaires, to Baron de Bruck, the Austrian Minister at Constantinople, was fruitless, and it became notorious at Smyrna that there was a settled design on the part of the Austrian officials to convey him clandestinely to Trieste — a city within the dominion of the Emperor of Austria. Opportunely, the United States sloop-of-war the St. Louis, under the command of Captain Ingraham, arrived in the harbor of Smyrna before this design was executed. The commander of the St. Louis, from the representation of the case made to him, felt it to be his duty, as it unquestionably was, to inquire into the validity of Koszta's claim to American protection. He proceeded with deliberation and prudence, and discovered what he considered just grounds for inquiring into Koszta's claim to be discharged on account of his American *nationality*. During the pendency of this inquiry, he received notice of the design to take Koszta clandestinely, before the question at issue was settled, into the dominions of the Emperor of Austria. As there was other evidence of bad faith besides the discovery of a design of evading the inquiry, Captain Ingraham demanded his release, and intimated that he should resort to force if the demand was not complied with by a certain hour. Fortunately, however, no force was used. An arrangement was made by which the prisoner was delivered to the custody of the French consul-general, to be kept by him until the United States and Austria should agree as to the manner of disposing of him."

The principles supposed to apply to allegiance and expatriation are thus stated:

"There is great diversity and much confusion of opinion as to the nature and obligations of allegiance. By some it is held to be an indestructible political tie, and though resulting from the mere accident of birth, yet for ever binding the subject to the sovereign; by others it is considered a political connection in the nature of a civil contract, dissoluble by mutual consent, but not so at the option of either party. The sounder and more prevalent doctrine, however, is, that the citizen or subject, having faithfully performed the past and present duties result-

subject might become a citizen of the United States, and be entitled to all the advantages of trade conceded between his

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ing from his relation to the sovereign power, may at any time release himself from the obligation of allegiance, freely quit the land of his birth or adoption, seek through all countries a home, and select anywhere that which offers him the fairest prospect of happiness for himself and his posterity. When the sovereign power, wheresoever it may be placed, does not answer the ends for which it is bestowed, when it is not exerted for the general welfare of the people, or has become oppressive to individuals, this right to withdraw rests on as firm a basis, and is similar in principle to the right which legitimates resistance to tyranny.

"The conflicting laws on the subject of allegiance are of a municipal character, and have no controlling operation beyond the territorial limits of the countries enacting them. All uncertainty as well as confusion on this subject is avoided by giving due consideration to the fact, that the parties to the question now under consideration are two independent nations, and that neither has the right to appeal to its own municipal laws for the rules to settle the matter in dispute, which occurred within the jurisdiction of a third independent power.

"Neither Austrian decrees nor American laws can be properly invoked for aid or direction in this case, but international law furnishes the rules for a correct decision, and by the light from this source shed upon the transaction at Smyrna are its true features to be discerned.

"Koszta being beyond the jurisdiction of Austria, her laws were entirely inoperative in his case, unless the Sultan of Turkey has consented to give them vigor within his dominions by treaty stipulations. The law of nations has rules of its own on the subject of allegiance, and disregards, generally, all restrictions imposed upon it by municipal codes.

"This is rendered most evident by the proceedings of independent States in relation to extradition. No State can demand from any other, as a matter of right, the surrender of a native-born or naturalized citizen or subject, an emigrant, or even a fugitive from justice, unless the demand is authorized by express treaty stipulation. International law allows no such claim, though comity may sometimes yield what right withholds. To surrender political offenders (and in this class Austria places Kozsta) is not a duty; but, on the contrary, compliance with such a demand would be considered a dishonorable subserviency to a foreign power, and an act meriting the reprobation of mankind. . . .

"The Austrian Internuncio at Constantinople, in a conference with Mr. Marsh, the American Minister Resident, spoke of such a right as derived from 'ancient capitulations by treaty and usage.' It is not shown or alleged that new treaty stipulations, since 1849, have been entered into by Turkey and Austria. The 'ancient capitulations' were relied on to support the demand in that year for the surrender of the Hungarian refugees; they were scrutinized, and no such authority as is now claimed was found in them. . . .

"But if Austria really has such authority by treaties as she now claims, it confessedly extends only to 'Austrian subjects.' It could not, therefore, be applied to Koszta unless he was such a subject at the time he was seized. If the question

native country and that foreign country; and that the circumstance of his returning to his native country for a mere temporary purpose would not deprive him of those advantages.[1]

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of his nationality is to be settled by international law, the only code which furnishes the rules by which this question is to be determined, there is no good reason for adjudging him to have been, when seized at Smyrna, an Austrian subject. But settle this question, as Austria would have it settled, by an appeal to her own civil code, the result would be the same.

"By the consent and procurement of the Emperor of Austria, Koszta had been sent into perpetual banishment. The Emperor was a party to the expulsion of the Hungarian refugees from Turkey. The sovereign by such an act deprives his subjects to whom it is applied of all their rights under his government. He places them where he cannot, if he would, afford them protection. By such an act he releases the subjects thus banished from the bond of allegiance. Any other result would make the political connection between the subject and the sovereign a state of unmitigated vassalage, in which all the duties and no rights would be on one side, and all the rights and no duties would be on the other. Koszta must be regarded as having been banished by Austria; for he was one of the Hungarian refugees whom she procured to be expelled from Turkey in 1851. They were released from confinement at Kutahia, on condition of submitting to perpetual banishment, and she had two persons present at their departure 'who claimed and obtained there an active share in the arrangements.' Koszta could never thereafter be rightfully demanded as an Austrian subject.

"The proposition that Koszta at Smyrna was not an 'Austrian subject' can be sustained on another ground. By a decree of the Emperor of Austria of the 24th of March, 1832, Austrian subjects leaving the dominions of the Emperor without permission of the magistrate and a release of Austrian citizenship, and with an intention never to return, become '*unlawful emigrants*,' and lose all their civil and political rights at home." Ency. Amer., Tit. Emigration, 2 Kent's Com. 50, 51.

"Koszta had left Austria without permission, and with the obvious and avowed intention never to return; he was, therefore, within the strict meaning of the imperial decree, 'an unlawful emigrant.' He had incurred and paid the penalty of that offence by the loss of all his civil and political rights. If he had property, it had escheated, and he was reduced to a state worse than absolute alienage; for aliens have, by right, the benefit of the civil laws for protection, in whatever country they may be. Stripped by this imperial decree of civil and political rights, Koszta had, in Austria, no redress for personal wrongs, and abroad he had no claim to protection from the government that would still hold him as a subject. He was, in regard to Austria, an outlaw. What right can a sovereign have to the allegiance of a person reduced by him to such a miserable condition? It seems to have been the very object of the Austrian decree to dissolve the previous political

[1] Term Rep. vol. viii. p. 31. Bos. & Pull. Rep. vol. i. p. 43, Wilson v. Marryatt.

2. The sovereign right of every independent State to regulate the property within its territory constitutes another exception to the rule.

Sovereign right of every independent State over the property within its territorial limits.

Thus the personal capacity to contract a marriage, as to age, consent of parents, &c., is regulated by the law of the State of which the party is a subject; but the effects

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connection between the 'unlawful emigrant' and the Emperor. In Koszta's case it was dissolved."

The secretary is brought, by a fair application of sound principles of law, and by a careful consideration of the facts, to this important conclusion: that those who act in behalf of Austria had no right whatever to seize and imprison Martin Koszta.

"It will be conceded that the civil authority of Turkey, during the whole period of the occurrences at Smyrna was dormant, and in no way called into action. Under these circumstances — Austria, without any authority, Turkey exercising none, and the American functionaries, as Austria asserts, having no right in behalf of their government to interfere in the affair, (a proposition which will be hereafter contested) — what, then, was the condition of the parties at the commencement of the outrage and through its whole progress? They were all, in this view of the case, without the immediate presence and controlling direction of civil or international law in regard to the treatment of Koszta. The Greek hirelings, Koszta, their victim, and the Austrian and American agents, were, upon this supposition, all in the same condition at Smyrna, in respect to rights and duties, so far as regards that transaction, as they would have been in if it had occurred in their presence in some unappropriated region lying far beyond the confines of any sovereign State whatever; they were the liege subjects of the law of nature, moral agents, bound each and all alike to observe the precepts of that law, and especially that which is confirmed by divine sanction, and enjoins upon all men, everywhere, when not acting under legal restraints, to do unto others whatsoever they would that others should do unto them; they were bound to do no wrong, and, to the extent of their means, to prevent wrong from being done — to protect the weak from being oppressed by the strong, and to relieve the distressed. In the case supposed, Koszta was seized without any rightful authority. He was suffering grievous wrong; any one that could, might relieve him. To do so was a duty imposed, under the peculiar circumstances of the case, by the laws of humanity. Captain Ingraham, in doing what he did for the release of Koszta, would, in this view of the case, be fully justified upon this principle. Who, in such a case, can fairly take offence? Who have a right to complain? Not the wrongdoers, surely, for they can appeal to no law to justify their conduct; they can derive no support from civil authority, for there was none called into action; nor from the law of nature, for that they have violated." . . .

"Koszta, when he was seized and imprisoned at Smyrna, had the national character of an American, and the government of the United States had the right to extend its protection over him. . . .

of a nuptial contract upon real property (*immobilia*) in another State are determined by the *lex loci rei sitæ*. *Huberus*, indeed,

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"It is not contended that the initiatory step (the declaration of intention) in the process of naturalization invested him with all the civil rights of an American citizen; but it is sufficient for all the purposes of this case to show that he was clothed with an American nationality; and, in virtue thereof, the government of the United States was authorized to extend to him its protection at home and abroad. Mr. Hülsemann falls into a great error — an error fatal to some of his most important conclusions — by assuming that a nation can properly extend its protection only to native-born or naturalized citizens. This is not the doctrine of international law, nor is the practice of nations circumscribed within such narrow limits. This law does not, as has been before remarked, complicate questions of this nature by respect for municipal codes. In relation to this subject, it has clear and distinct rules of its own. It gives the national character of the country not only to native-born and naturalized citizens, but to all residents in it who are there with, or even without, an intention to become citizens, provided they have a domicile therein. Foreigners may, and often do, acquire a domicile in a country, even though they have entered it with the avowed intention not to become naturalized citizens, but to return to their native land at some remote and uncertain period; and, whenever they acquire a domicile, international law at once impresses upon them the national character of the country of that domicile. It is a maxim of international law that domicile confers a national character; it does not allow any one who has a domicile to decline the national character thus conferred; it forces it upon him often very much against his will, and to his great detriment. International law looks only to the national character in determining what country has the right to protect. If a person goes from this country abroad, with the nationality of the United States, this law enjoins upon other nations to respect him, in regard to protection, as an American citizen. It concedes to every country the right to protect any and all who may be clothed with its nationality. . . .

"If Koszta ever had a domicile in the United States, he was in virtue thereof invested with the nationality of this country, and in this character continued as long as that domicile was retained. There are cases in which it is difficult to settle the question of domicile; but that of Koszta is not one of them. . . .

"He came to and resided in this country one year and eleven months. He came here with the intention of making it his future abode. This intention was manifested in several ways, but most significantly by his solemn declaration upon oath. There can be no better evidence of his design of making the United States his future home than such a declaration; and to this kind of evidence of the intention, the indispensable element of true domicile, civilians have always attached importance. (Phillimore, § 188.) In the case of Koszta, we have all that is required to prove that he had a domicile in the United States — the concurrence of an actual residence with the intention to make this country his future home.

"The establishment of his domicile here invested him with the national character of this country, and with that character he acquired the right to claim protection

lays down the contrary doctrine, upon the ground that the foreign law, in this case, does not affect the territory immediately,

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from the United States, and they had the right to extend it to him as long as that character continued.

"The next question is, was Koszta clothed with that character when he was kidnapped in the streets of Smyrna, and imprisoned on board of the Austrian brig-of-war Huszar? The national character acquired by residence remains as long as the domicile continues, and that continues not only as long as the domiciled person continues in the country of his residence, but until he acquires a new domicile. . . .

"As the national character, according to the law of nations, depends upon the domicile, it remains as long as the domicile is retained, and is changed with it. Koszta was, therefore, vested with the nationality of an American citizen at Smyrna, if he in contemplation of law, had a domicile in the United States. To lose a domicile when once obtained, the domiciled person must leave the country of his residence with the intention to abandon that residence, and must acquire a domicile in another. Both of these facts are necessary to effect a change of domicile; but neither of them exists in Koszta's case. The facts show that he was only temporarily absent from this country on private business, with no intention of remaining permanently in Turkey, but, on the contrary, was at the time of his seizure awaiting an opportunity to return to the United States.

"Whenever, by the operation of the law of nations, an individual becomes clothed with our national character, be he a native-born or naturalized citizen, an exile driven from his early home by political oppression, or an emigrant enticed from it by the hopes of a better fortune for himself and his posterity, he can claim the protection of this government, and it may respond to that claim without being obliged to explain its conduct to any foreign power, for it is its duty to make its nationality respected by other nations, and respectable in every quarter of the globe.

"This right to protect persons having a domicile, though not native-born or naturalized citizens, rests on the firm foundation of justice, and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard. Such domiciled citizen pays the same price for his protection as native-born or naturalized citizens pay for theirs. He is under the bonds of allegiance to the country of his residence, and if he breaks them incurs the same penalties; he owes the same obedience to the civil laws, and must discharge the duties they impose on him; his property is in the same way, and to the same extent as theirs, liable to contribute to the support of the government. In war he shares equally with them in the calamities which may befall the country; his services may be required for its defence; his life may be perilled and sacrificed in maintaining its rights and vindicating its honor. In nearly all respects his and their condition as to the duties and burdens of government are undistinguishable; and what reasons can be given why, so far at least as regards protection to person and property abroad as well as at home, his rights should not be co-extensive with the rights of native-born or naturalized citizens? By the law

but only in an incidental manner, and that by the implied consent of the sovereign, for the benefit of his subjects, without pre-

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of nations they have the same nationality; and what right has any foreign power, for the purpose of making distinction between them, to look behind the character given them by that code which regulates national intercourse? When the law of nations determines the nationality of any man, foreign governments are bound to respect its decision.

"They would have no cause to complain if the protecting power should stand upon its extreme rights in all cases; but that power, in discharging its duties of protecting, may, for sufficient reasons, have some regard for the civil distinctions which its own laws make between the different classes of persons to whom it has the right, under international law, to extend its protection. It will naturally watch with more care, and may act with more vigor, in behalf of native-born and naturalized citizens, than in behalf of those who, though clothed with its nationality, have not been so permanently incorporated into its political community.

"Giving effect to these well-established principles, and applying them to the facts in the case, the result is, that Koszta acquired, while in the United States, their national character; that he retained that character when he was seized at Smyrna, and that he had a right to be respected as such while there, by Austria and every other foreign power. The right of a nation to protect, and require others to respect, at home and abroad, all who are clothed with its nationality, is no new doctrine, now for the first time brought into operation by the United States. It is common to all nations, and has had the sanction of their practice for ages. . . .

"The liberal policy of the United States in regard to receiving immigrants from all nations, and extending to them the advantages of their free institutions, makes it an act of justice on their part to maintain the right of national protection to the full extent authorized by the law of nations, and to resist with firmness any attempt to impose any restrictions upon it."

So far the claim of Koszta to American protection is placed on considerations which would equally apply in any country; but, apart from his right to our interposition, as founded on naturalization or domicile, the peculiar usages of Turkey and other eastern nations would, under the circumstances, the Secretary further shows, have justified the proceedings of the American commander.

"There is another view of this case which places the conduct of the agents of this government at Smyrna upon equally defensible grounds. The American Consul there, and the American Legation at Constantinople, acted with great caution in relation to Koszta's claim to be regarded as entitled to the protection of this government. As his naturalization had not been perfected, they hesitated at first to receive him under their protection; but the facts show that they ultimately yielded to his application. He received from each a *tezkereh* — in effect a certificate — that the person to whom it is given is cared for, and received under the protection of the government whose agent has granted it.

"By the laws of Turkey and other eastern nations, the consulates therein may receive under their protection strangers and sojourners whose religion and social

judicing his or their rights. But the practice of nations is certainly different, and therefore no such consent can be implied to

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manners do not assimilate with the religion and manners of those countries. The persons thus received become thereby invested with the nationality of the protecting consulate. These consulates, and other European establishments in the East, are in the constant habit of opening their doors for the reception of such inmates, who are received irrespective of the country of their birth or allegiance. It is not uncommon for them to have a large number of such *protegés*. International law recognizes and sanctions the rights acquired by this connection.

"The Lords of Appeals in the High Court of Admiralty in England decided in 1784, that a merchant carrying on trade at Smyrna, under the protection of a Dutch Consul, was to be considered a Dutchman as to his national character. Wheaton's Inter. Law, 3d ed. p. 384, 3 Rob. Adm. Reports, p. 12.

"This decision has been examined and approved by the eminent jurists who have since written treatises on international law.

"According to the principle established in this case, Koszta was invested with the nationality of the United States, if he had it not before, the moment he was under the protection of the American Consul at Smyrna and the American Legation at Constantinople. That he was so received is established by the *tezkereh* they gave him, and the efforts they made for his release. . . .

"Having been received under the protection of these American establishments, he had thereby acquired, according to the law of nations, their nationality; and when wronged and outraged as he was, they might interpose for his liberation, and Captain Ingraham had a right to cöoperate with them for the accomplishment of that object. . . .

"If the conclusions heretofore arrived at are correct, the Austrian agents had no more right to take Koszta from the soil of the Turkish dominions than from the territory of the United States, and Captain Ingraham had the same right to demand and enforce his release as he would have had if Koszta had been taken from American soil, and incarcerated in a national vessel of the Austrian Emperor. In this question, confined as it is to the United States and Austria, the place of the transaction is immaterial, unless the Austrian municipal laws extended over it. . . .

"The conclusions at which the President has arrived, after a full examination of the transaction at Smyrna, and a respectful consideration of the views of the Austrian government thereon, as presented in Mr. Hülsemann's note, are, that Koszta, when seized and imprisoned, was invested with the nationality of the United States, and they had, therefore, the right, if they chose to exercise it, to extend their protection to him; that from international law — the only law which can be rightfully appealed to for rules of action in this case — Austria could derive no authority to obstruct or interfere with the United States in the exercise of this right, in effecting the liberation of Koszta; and that Captain Ingraham's interposition for his release was, under the peculiar and extraordinary circumstances of the case, right and proper. . . .

"The President does not see sufficient cause for disavowing the acts of the

waive the local law which has impressed certain indelible qualities upon immovable property within the territorial jurisdiction.[1]

American agents which are complained of by Austria. Her claim for satisfaction on that account has been carefully considered, and is respectfully declined.

"Being convinced that the seizure and imprisonment of Koszta were illegal and unjustifiable, the President also declines to give his consent to his delivery to the Consul-General of Austria at Smyrna; but, after a full examination of the case, as herein presented, he has instructed (the Secretary of State) to communicate to Mr. Hülsemann his confident expectation that the Emperor of Austria will take the proper measures to cause Martin Koszta to be restored to the same condition he was in before he was seized in the streets of Smyrna on the 21st of June last." Cong. Doc. 33 Cong. 1 Sess. Senate, Ex. Doc. No. 1.

The further discussion of this question was rendered unnecessary by an arrangement, concluded between the American and Austrian legations, at Constantinople. It was agreed that Koszta should embark under the *surveillance* of their respective consular authorities at Smyrna, on board of an American ship-of-war, if there was one there, otherwise on board of a merchant vessel, which should proceed immediately to the United States without stopping at any intermediate port, except in case of necessity, and that Koszta should be provided with an American passport, which should prohibit his changing his route before landing in this country. The Austrian government reserved the right of proceeding against him should he be again found in Ottoman territory. Cong. Doc. 33 Cong. 1 Sess. H. R. Ex. Doc. No. 91.

The protection which this country affords to naturalized citizens, or those who are clothed with its nationality, does not extend to defend them against the authorities of their own country, in case of their voluntary return to it. Mr. Marcy writes to Mr. Jackson, Chargé d'Affaires at Vienna, on 10th of January, 1854: "I have carefully examined your despatches relating to the case of Simon Tousig, and regret to find that it is one which will not authorize a more effective interference than that which you have already made in his behalf. It is true he left this country with a passport issued from this department; but as he was neither a native-born nor naturalized citizen, he was not entitled to it. It is only to citizens that passports are issued."

"Assuming all that could possibly belong to Tousig's case — that he had a domicile here and was actually clothed with the nationality of the United States — there is a feature in it which distinguishes it from that of Koszta. Tousig voluntarily returned to Austria, and placed himself within the reach of her municipal laws. He went by his free act under their jurisdiction, and thereby subjected himself to them. If he had incurred penalties or assumed duties while under these laws, he might have expected they would be enforced against him, and should have known that the new political relation he had acquired, if indeed he had acquired any, could not operate as a release from these penalties. Having

[1] Kent's Commentaries on American Law, vol. ii. pp. 182, 186, Note, 5th edit.

As to personal property (*mobilia*) the *lex loci contractûs* or *lex domicilii* may, in certain cases, prevail over that of the place

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been once subject to the municipal laws of Austria, and while under her jurisdiction violated these laws, his withdrawal from that jurisdiction and acquiring a different national character would not exempt him from their operation whenever he again chose to place himself under them. Every nation, whenever its laws are violated by any one owing obedience to them, whether he be a citizen or a stranger, has a right to inflict the penalties incurred upon the transgressor, if found within its jurisdiction. The case is not altered by the character of the laws, unless they are in derogation of the well-established international code. No nation has a right to supervise the municipal code of another nation, or claim that its citizens or subjects shall be exempted from the operation of such code, if they have voluntarily placed themselves under it. The character of the municipal laws of one country does not furnish a just ground for other States to interfere with the execution of these laws, even upon their own citizens, when they have gone into that country and subjected themselves to its jurisdiction. If this country can rightfully claim no such exemption for its native-born or naturalized citizens, surely it cannot claim it for those who have at most but inchoate rights of citizens.

"The above principle, that persons, being citizens or subjects of one State, and having violated the laws of another State, may be punished while they remain under, or are fairly brought within, the jurisdiction of the latter State, is too well established to be made a matter of serious controversy. It is clearly affirmed in, and indeed is the basis of, every extradition treaty. Each contracting party agrees to deliver up to the other, fugitive offenders — generally including its own citizens as well as strangers — for specified offences, to be dealt with according to the laws of the country demanding the surrender of them. It is true that there are some kinds of offences which are not, and ought not to be, included in extradition treaties: such, for instance, as are called political offences; yet, because one nation will not enter into a compact to deliver such offenders to another, that does not justify the inference that if such offenders go voluntarily within the jurisdiction of the country whose laws they have offended, they may not be rightfully punished, or that they can claim exemption from punishment if they were citizens of another country when the offence was committed, or had, after committing it, acquired another nationality.

"The country whose protection is invoked cannot, it is conceived, properly interpose in such a case, unless the municipal law, the violation of which is charged, contravenes some right of such country acquired by treaty stipulations, or otherwise.

"The principle does not at all interfere with the right of any State to protect its citizens, or those entitled to its protection, when abroad, from wrongs and injuries — from arbitrary acts of oppression or deprivation of property, as contra-distinguished from penalties and punishments incurred by the infraction of the laws of the country within whose jurisdiction the sufferers have placed themselves. I do not discover any principle in virtue of which this government can claim, as

where the property is situated. Huberus holds that not only the marriage contract itself, duly celebrated in a given place, is valid in all other places, but that the rights and effects of the contract, as depending upon the *lex loci*, are to be equally in force everywhere.[1] If this rule be confined to personal property, it may be considered as confirmed by the unanimous authority of the public jurists, who unite in maintaining the doctrine that the incidents and effects of the marriage upon the property of the parties, wherever situated, are to be governed by the law of the matrimonial domicile, in the absence of any other positive nuptial contract.[2] But if there be an express ante-nuptial contract, the rights of the parties under it are to be governed by the *lex loci contractus*.[3]

Effect of bankrupt discharge and title of assignees in another country.

By the general international law of Europe and America, a certificate of discharge obtained by a bankrupt in the country of which he is a subject, and where the contract was made and the parties domiciled, is valid to discharge the debtor in every other country;

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a matter of right, the release of Tousig. He has voluntarily placed himself within the jurisdiction of the laws of Austria, and is suffering, as appears by the case as you present it, for the acts he had done in violation of those laws while he was an Austrian subject." Cong. Doc. 33 Cong. 1 Sess. H. R. Ex. Doc. No. 41.

A case presenting the question how far a naturalized citizen of the United States, on his return to the country of his origin, could claim the interposition of the American legation to protect him against the performance of the duties imposed on him as a native subject, by the sovereign whose allegiance he had renounced, occurred in 1840, during Mr. Wheaton's residence at Berlin. To the application of a naturalized citizen of the United States, who had been required to perform military duty in Prussia, of which he was a native, he replied; "Had you remained in the United States or visited any other foreign country (except Prussia) on your lawful business, you would have been protected by the American authorities at home and abroad, in the enjoyment of all your rights and privileges as a naturalized citizen of the United States. But having returned to the country of your birth, your *native domicile and national character revert* (so long as you remain in the Prussian dominions,) and you are bound in all respects to obey the laws, exactly as if you had never emigrated." Mr. Wheaton to J. P. Knocke, 24th July, 1840. MS. Despatches.

[1] "Porro, non tantum ipsi contractus ipsæque nuptiæ, certis locis ritè celebratæ, ubique pro justis et validis habentur; sed etiam jura et effecta contractuum nuptiarumque, in iis locis recepta, ubique vim suam obtinebunt." Huberus, l. i. tit 3, de Conflict. Leg. § 9.

[2] Fœlix, § 66.

[3] Johnson's Ch. Rep. vol. iii. p. 211. De Couche *v.* Savetier.

but the opinions of jurists and the practice of nations have been much divided upon the question, how far the title of his assignees or syndics will control his personal property situated in a foreign country, and prevent its being attached and distributed under the local laws in a different course from that prescribed by the bankrupt code of his own country. According to the law of most European countries, the proceeding which is commenced in the country of the bankrupt's domicile draws to itself the exclusive right to take and distribute the property. The rule thus established is rested upon the general principle that personal (or movable) property is, by a legal fiction, considered as situated in the country where the bankrupt had his domicile. But the principles of jurisprudence, as adopted in the United States, consider the *lex loci rei sitæ* as prevailing over the *lex domicilii* in respect to creditors, and that the laws of other States cannot be permitted to have an extra-territorial operation to the prejudice of the authority, rights, and interests of the State where the property lies. The Supreme Court of the United States has therefore determined, that both the government under its prerogative priority, and private creditors attaching under the local laws, are to be preferred to the claim of the assignees for the benefit of the general creditors under a foreign bankrupt law, although the debtor was domiciled and the contract made in a foreign country.[1]

3. The general rule as to the application of personal statutes yields in some cases to the operation of the *lex loci contractus*.

The *lex loci contractus* often causes exceptions to this rule.

Thus a bankrupt's certificate under the laws of his own country cannot operate in another State, to discharge him from his debts contracted with foreigners in a foreign country. And though the personal capacity to enter into the nuptial contract as to age, consent of parents, and prohibited degrees of affinity, &c., is generally to be governed by the law of the State of which the party is a subject, the marriage ceremony is always regulated by the law of the place where it is celebrated; and if valid there,

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[1] Bell's Commentaries on the Law of Scotland, vol. ii. pp. 681–687. Rose's Cases in Bankruptcy, vol. i. p. 462. Kent's Commentaries on American Law, vol. ii. pp. 393, 404–408, 459, 5th edit. Cranch's Rep. vol. v. p. 289 — Harrison *v.* Sterry. Wheaton's Rep. vol. xii. pp. 153–163 — Ogden *v.* Saunders.

it is considered as valid everywhere else, unless made in fraud of the laws of the country of which the parties are domiciled subjects.

§ 7. Lex loci contractus.

II. The municipal laws of the State may also operate beyond its territorial jurisdiction, where a contract made within the territory comes either directly or incidentally in question in the judicial tribunals of a foreign State.

A contract, valid by the law of the place where it is made, is, generally speaking, valid everywhere else. The general comity and mutual convenience of nations have established the rule, that the law of that place governs in every thing respecting the form, interpretation, obligation, and effect of the contract, wherever the authority, rights, and interests of other States and their citizens are not thereby prejudiced.[1]

Exceptions to its operation.

This qualification of the rule suggests the exceptions which arise to its application. And,

1. It cannot apply to cases properly governed by the *lex loci rei sitæ*, (as in the case, before put, of the effect of a nuptial contract upon real property in a foreign State,) or by the laws of another State relating to the personal state and capacity of its citizens.

2. It cannot apply where it would injuriously conflict with the laws of another State relating to its police, its public health, its commerce, its revenue, and generally its sovereign authority, and the rights and interests of its citizens.

Thus, if goods are sold in a place where they are not prohibited, to be delivered in a place where they are prohibited, although the trade is perfectly lawful by the *lex loci contractus*, the price cannot be recovered in the State where the goods are deliverable, because to enforce the contract there would be to sanction a breach of its own commercial laws. But the tribunals of one country do not take notice of, or enforce, either directly or incidentally, the laws of trade or revenue of another State, and

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[1] "Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium præjudicitur." Huberus, l. i. tit. 3, de Conflict. Leg. § 2. "Effecta contractuum, certo loco initorum, pro jure loci illius alibi quoque observantur, si nullum inde civibus alienis creetur præjudicium, in jure sibi quæsito." Ib. § 11.

therefore an insurance of prohibited trade may be enforced in the tribunals of any other country than that where it is prohibited by the local laws.[1]

Foreign marriages.

Huberus holds that the contract of marriage is to be governed by the law of the place where it is celebrated, excepting fraudulent evasions of the law of the State to which the party is subject.[2] Such are marriages contracted in a foreign State, and according to its laws, by persons who are minors, or otherwise incapable of contracting, by the law of their own country. But according to the international marriage law of the British Empire, a clandestine marriage in Scotland, of parties originally domiciled in England, who resort to Scotland, for the sole purpose of evading the English marriage act, requiring the consent of parents or guardians, is considered valid in the English Ecclesiastical Courts. This jurisprudence is said to have been adopted upon the ground of its being a part of the general law and practice of Christendom, and that infinite confusion and mischief would ensue, with respect to legitimacy, succession, and other personal and proprietary rights, if the validity of the marriage contract was not determined by the law of the place where it was made. The same principle has been

English law.

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[1] Pardessus, Droit Commercial, pt. vi. tit. 7, ch. 2, § 3. Emerigon, Traité d'Assurance, tom. i. pp. 212–215. Park on Insurance, p. 341, 6th ed. The moral equity of this rule has been strongly questioned by Bynkershoek and Pothier.

[2] "Si licitum est, eo loco ubi contractum et celebratum est, ubique validum erit, effectumque habebit, sub eâdem exceptione, prejudicii aliis non creandi." Huberus, De Conflict. Leg. l. i. tit. 3, § 8. He puts, as an example of this exception, the case of parties going into another country, merely to evade the law of their own, as to majority and guardianship. "Sæpe fit, adolescentes sub curatoribus agentes, furtivos amores nuptiis conglutinare cupientes, abeant in Frisiam Orientalem, aliave loca, in quibus curatorum consensus ad matrimonium non requiritur, juxta leges Romanas, quæ apud nos hâc parte cessant. Celebrant ibi matrimonium, et mox redeunt in patriam. Ego ita existimo, hanc rem manifeste pertinere ad eversionem juris nostri; et ideo non esse magistratûs, huic obligatos, è jure gentium, ejusmodi nuptias agnoscere et ratas habere. Multoque magis statuendum est, eos contra jus gentium facere videri, qui civibus alieni imperii suâ facilitate, jus patriis legibus contrarium, scientes, volentes, impertiuntur." De Conflict. Leg. Idem.

recognized between the different States of the American Union, upon similar grounds of public policy.[1] (*a*)

French law. On the other hand, the age of consent required by the French Civil Code is considered, by the law of France, as a personal quality of French subjects, following them wherever they remove; and, consequently, a marriage by a Frenchman, within the required age, will not be regarded as valid by the French tribunals, though the parties may have been above the age required by the law of the place where it was contracted.[2] (*b*)

3. Wherever, from the nature of the contract itself, or the law of the place where it is made, or the expressed intention of the parties, the contract is to be executed in another country, every thing which concerns its execution is to be determined by the law of that country. Those writers who affirm that this exception extends to every thing respecting the nature, the validity, and the interpretation of the contract, appear to have erred, in supposing that the authorities are at variance on this question. They will be found, on a critical examination, to establish the distinction between what relates to the validity and interpretation, and what relates to the execution of the contract. By the usage of nations, the former is to be determined by the *lex loci contractus*, the latter by the law of the place where it is to be carried into execution.[3]

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[1] Haggard's Consist. Rep. vol. ii. p. 428–433. Kent's Commentaries, vol. ii. p. 93.

(*a*) [Story on Conflict of Laws, § 89. The same doctrine has been applied in Massachusetts, to admit the legitimacy of the issue of a person who had been divorced *à vinculo* for adultery, and had been declared by the local law incompetent to marry again, but who had gone into a neighboring State, and there contracted a new marriage, and had issue by that marriage; and the widow by such second marriage has, likewise, been declared entitled to dower in the real estate of her husband. Id. §§ 123, 124.]

[2] Merlin, Repértoire, tit. *Loi*, § 6. Toullier, Droit Français, tom. i. No. 118, 576.

(*b*) [" There can be little doubt that foreign countries, where such marriages are celebrated, will follow their own law and disregard that of France." Story on Conflict of Laws, § 90. For a *resumé* of the laws of the States which have, and of those which have not, adopted the principle of the French Code, see Fœlix, Des Mariages Contractés en Pays Étranger. Rev. Etr. et Franç. tom. viii. p 633.]

[3] Fœlix, Droit International Privé, § 74.

§ 8. Lex fori.

4. As every sovereign State has the exclusive right of regulating the proceedings, in its own courts of justice, the *lex loci contractus* of another country cannot apply to such cases as are properly to be determined by the *lex fori* of that State where the contract is brought in question.

Thus, if a contract made in one country is attempted to be enforced, or comes incidentally in question, in the judicial tribunals of another, every thing relating to the forms of proceeding, the rules of evidence, and of limitation, (or prescription,) is to be determined by the law of the State where the suit is pending, not of that where the contract is made.[1] (*a*)

§ 9. Foreign sovereign, his ambassador, army, or fleet, within the territory of another State.

III. The municipal institutions of a State may also operate beyond the limits of its territorial jurisdiction, in the following cases: —

1. The person of a foreign sovereign, going into the territory of another State, is, by the general usage and comity of nations, exempt from the ordinary local jurisdiction. Representing the power, dignity, and all the sovereign

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[1] Kent's Commentaries, vol. ii. p. 459, 5th ed. Fœlix, Droit International Privé, § 76.

(*a*) [The rule of the Supreme Court of the United States always has been that the laws of a foreign country, designed only for the direction of its own affairs, are not to be noticed by other countries, unless proved as facts; and that the sanction of an oath is required for their establishment, unless they can be verified by some other authority, that the law respected not less than the oath of an individual. The Court decided that the Code Civil, which is contained in one of the volumes of the "Bulletin des Lois, à Paris, l'imprimerie royale," with the indorsement, "Le Garde des Sceaux de France, à la Cour Suprême des États Unis," which was sent to the Supreme Court in the course of our national exchanges of laws with France, which Congress had acknowledged, and to reciprocate which they had made an appropriation, was authenticated in such a way as that it might be received by the Court, for the purpose of proving what the law of France was in the case under consideration. Howard's Reports, vol. xiv. p. 429. Ennis et al. *v.* Smith et al.

By the 69th article, § 9, of the French Code of Civil Procedure, in case of proceedings against foreigners, a copy of the writ (*exploit*) is required to be sent to the department of Foreign Affairs. This is done in order that it may reach the party interested; and the rule is, for the department to send it to the proper French Diplomatic Agent, to be delivered to the Ministry of Foreign Affairs of the government to which he is accredited. Fœlix, Droit International Privé, § 150.]

attributes of his own nation, and going into the territory of another State, under the permission which (in time of peace) is implied from the absence of any prohibition, he is not amenable to the civil or criminal jurisdiction of the country where he temporarily resides.[1]

2. The person of an ambassador, or other public minister, whilst within the territory of the State to which he is delegated, is also exempt from the local jurisdiction. His residence is considered as a continued residence in his own country, and he retains his national character, unmixed with that of the country where he locally resides.[2]

3. A foreign army or fleet, marching through, sailing over, or stationed in the territory of another State, with whom the foreign sovereign to whom they belong is in amity, are also, in like manner, exempt from the civil and criminal jurisdiction of the place.[3] (*a*)

If there be no express prohibition, the ports of a friendly State are considered as open to the public armed and commissioned ships belonging to another nation, with whom that State is at peace. Such ships are exempt from the jurisdiction of the local tribunals and authorities, whether they enter the ports under the license implied from the absence of any prohibition, or under an express permission stipulated by treaty. But the private vessels

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[1] Bynkershoek, de Foro Legat. cap. iii. cap. ix.

[2] Vide infra, Pt. III. ch. 1.

[3] "Exceptis tamen ducibus et generalibus, alicujus exercitûs, vel classis maritimæ, vel ductoribus etiam alicujus navis militaris, nam isti in suos milites, gentem, et naves, libere jurisdictionem sive voluntariam sive contentiosam, sive civilem, sive criminalem, quod occupant tanquam in suo proprio, exercere possunt," etc. Casaregis, Disc. 136, 174.

(*a*) [It is a sufficient answer to a suit brought against a foreign functionary, for seizing a vessel as such functionary, that it was done by virtue of the powers vested in him by his government. Opinions of Attorneys-General, June, 1794, vol. i. p. 46, Collot's case. And, in a subsequent case, the Attorney-General gave it as his opinion, that "it is as well settled in the United States as in Great Britain, that a person acting under a commission from the sovereign of a foreign nation is not amenable for what he does, in pursuance of his commission, to any judiciary tribunal in the United States." Id. December, 1797, vol. i. p. 81. The case, which arose in 1840, growing out of the arrest, by the State authorities of New York, of an Englishman charged with arson and murder, in connection with the capture and destruction, in the preceding year, within the juris-

of one State, entering the ports of another, are not exempt from the local jurisdiction, unless by express compact, and to the extent provided by such compact.

Decision of the Supreme Court of the United States, in the case of an American ship, seized in 1810, at St. Sebastien, by order of Napoleon.

The above principles, respecting the exemption of vessels belonging to a foreign nation from the local jurisdiction, were asserted by the Supreme Court of the United States, in the celebrated case of The Exchange, a vessel which had originally belonged to an American citizen, but had been seized and confiscated at St. Sebastien, in Spain, and converted into a public armed vessel by the Emperor Napoleon, in 1810, and was reclaimed by the original owner, on her arrival in the port of Philadelphia.

In delivering the judgment of the Court in this case, Mr. Chief Justice Marshall stated that the jurisdiction of courts of justice was a branch of that possessed by the nation as an independent sovereign power. The jurisdiction of the nation, within its own territory, is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty, to the same extent, in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation, within its own territories, must be traced up to the consent of the nation itself. They could flow from no other legitimate source.

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diction of that State, of a steamboat employed by the Canadian insurgents, led to a diplomatic discussion of this subject, as well as to the examination, by Mr. Wheaton, of the questions involved, in the principal legal journal of France. The local authorities refused to discharge the accused without trial; but the failure to convict him, by the verdict of the jury, put a practical termination to the controversy. And to prevent the recurrence of transactions of this nature, by which the action of one of the States might jeopard the foreign relations of the Federal Government, the Act of 29th August, 1842, was passed, for bringing such cases under the cognizance of the United States' judges, at the inception of the proceedings. Webster's Works, vol. ii. pp. 119, 120. Id. vol. v. pp. 116, 120 125, 133. Id. vol. vi. pp. 254, 266. Rev. Etr. & Fr. tome ix. p. 81 — De la juridiction qui s'est présentée devant les Cours des États Unis, dans l'affaire de McLeod. U. S. Statutes at Large, vol. v. p. 539.]

This consent might be either express or implied. In the latter case it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, under certain peculiar circumstances, of that absolute and complete jurisdiction, within their respective territories, which sovereignty confers.

This consent might, in some instances, be tested by common usage, and by common opinion growing out of that usage. A nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should suddenly, and without previous notice, exercise its territorial jurisdiction in a manner not consonant to the usages and received obligations of the civilized world.

This perfect equality and absolute independence of sovereigns and this common interest impelling them to mutual intercourse, has given rise to a class of cases, in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

Exemption of the person of the foreign sovereign from the local jurisdiction.

1. One of these was the exemption of the person of the sovereign from arrest or detention within a foreign territory.

If he enters that territory with the knowledge and license of its sovereign, that license, although containing no express stipulation exempting his person from arrest, was universally understood to imply such stipulation.

Why had the whole civilized world concurred in this construction? The answer could not be mistaken. A foreign sovereign was not understood as intending to subject himself to a jurisdiction incompatible with his dignity and the dignity of his nation, and it was to avoid this subjection that the license had been obtained. The character of the person to whom it was given, and the object for which it was granted, equally required that it should be construed to impart full security to the person who had obtained it. This security, however, need not be expressed; it was implied from the circumstances of the case.

Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which did not appear to be perfectly settled, a decision of which was not necessary to any conclusion to which the court might come in the case under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity had placed in their hands.

Exemption of foreign ministers from the local jurisdiction.

2. A second case, standing on the same principles with the first, was the immunity which all civilized nations allow to foreign ministers.

Whatever might be the principle on which this immunity might be established, whether we consider the minister as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of extra-territoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

This consent is not expressed. It was true that in some countries, and in the United States among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess. The assent of the local sovereign to the very important and extensive exemptions from territorial jurisdiction which are admitted to attach to foreign ministers, is implied from the consideration, that, without such exemptions, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him implies a consent that he shall possess

those privileges which his principal intended he should retain, privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what cases a public minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, was an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original consent, has ceased to be entitled to them.

Exemption from the local jurisdiction of foreign troops passing through the territory.

3. A third case, in which a sovereign is understood to cede a portion of his territorial jurisdiction, was where he allows the troops of a foreign prince to pass through his dominions.

In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require.

But if, without such express permission, an army should be led through the territories of a foreign prince, might the territorial jurisdiction be rightfully exercised over the individuals composing that army?

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his con-

sent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permission and a particular license is not perceived. It would seem reasonable, that every immunity which would be conferred by a special license, would be, in like manner, conferred by such general permission.

It was obvious that the passage of an army through a foreign territory would probably be, at all times, inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominions it passed. Such a passage would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like those that the general license to foreigners to enter the dominions of a friendly power is never understood to extend to a military force; and an army marching into the dominions of another sovereign, without his special permission, may justly be considered as committing an act of hostility; and, even if not opposed by force, acquires no privilege by its irregular and improper conduct. It might, however, well be questioned whether any other than the sovereign of the State is capable of deciding that such military commander is acting without a license.

Exemption of foreign ships of war, entering the ports of any nation, under an express or implied permission.

But the rule which is applicable to armies did not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, attending it, do not ensue from admitting a ship of war, without special license into a friendly port. A different rule, therefore, with respect to this species of military force, had been generally adopted. If, for reasons of State, the ports of a nation generally, or any particular ports be closed against vessels of war generally, or against the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to

enter such ports, and to remain in them while allowed to remain, under the protection of the government of the place.

The treaties between civilized nations, in almost every instance, contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases the sovereign is bound by compact to authorize foreign vessels to enter his ports, and this is a license which he is not at liberty to retract.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived for distinguishing their case from that of vessels which enter by express assent.

The whole reasoning, upon which such exemption had been implied in the case of a sovereign or his minister, applies with full force to the exemption of ships of war in the case in question.

"It is impossible to conceive," said Vattel, "that a prince who sends an ambassador, or any other minister, can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independence of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independence; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation." [1]

Equally impossible was it to conceive, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this could not be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

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[1] Vattel, Droit des Gens, liv. 4, ch. 7, § 92.

Distinction between public and private vessels.

According to the judgment of the Supreme Court of the United States, where, without treaty, the ports of a nation are open to the public and private ships of a friendly power, whose subjects have also liberty, without special license, to enter the country for business or amusement, a clear distinction was to be drawn between the rights accorded to private individuals, or private trading vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other; or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects, then, passing into foreign countries, are not employed by him, nor are they engaged in national pursuits. Consequently there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption.

But the situation of a public armed ship was, in all respects, different. She constitutes a part of the military force of her nation, acts under the immediate and direct command of the sovereign, is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without seriously affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seemed to the court ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rites of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly, in practice, nations had not yet asserted their jurisdiction over

the public armed ships of a foreign sovereign, entering a port open for their reception.

Bynkershoek, a public jurist of great reputation, had indeed maintained that the property of a foreign sovereign was not distinguishable, by any legal exemption, from the property of an ordinary individual; and had quoted several cases in which courts of justice had exercised jurisdiction over cases in which a foreign sovereign was made a party defendant.[1]

Without indicating any opinion on this question, it might safely be affirmed, that there is a manifest distinction between the private property of a person who happens to be a prince and that military force which supports the sovereign power, and maintains the dignity and independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as, so far, laying down the prince and assuming the character of a private individual; but he cannot be presumed to do this with respect to any portion of that armed force which upholds his crown and the nation he is intrusted to govern.

The only applicable case cited by Bynkershoek was that of the Spanish ships of war, seized in 1668, in Flushing, for a debt due from the King of Spain. In that case the States-General interposed; and there is reason to believe, from the manner in which the transaction is stated, that either by the interference of government, or by the decision of the tribunal, the vessels were released.[2] (*a*)

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[1] Bynkershoek, de Foro Legat. cap. iv.

[2] "Anno 1668, privati quidam Regis Hispanici creditores tres ejus regni naves bellicas, quæ portum Flissingensem subiverant, arresto detinuerunt, ut inde ipsis satisfieret, Rege Hispanico ad certum diem per epistolam in jus vocato ad judices Flissingenses, sed ad legati Hispanici expostulationes Ordines Generales, 12 Dec. 1668, decreverunt, Zelandiæ Ordines curare vellent, naves illæ continuò demitterentur liberæ, admoneretur tamen per literas Hispaniæ Regina, ipsa curare vellet, ut illis creditoribus, in causâ justissimâ, satisfieret, ne repressalias, quas imploraverunt, largiri tenerentur." Bynkershoek, cap. iv.

(*a*) [Several cases are cited by M. Fœlix, as decided by the French tribunals, from which the conclusion is deduced, that no proceeding can be carried on against property of any kind belonging to a foreign sovereign: — "Aucune poursuite ne peut être exercée contre les biens de toute espèce appartenant à un gou-

This case of the Spanish vessels was believed to be the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The distinction made in the laws of the United States between public and private ships, would appear to proceed from the same opinion.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction which it would be a breach of faith to exercise. Those general statutory provisions, therefore, which are descriptive of the ordinary jurisdiction of the judicial tribunals, which give an individual, whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of the Supreme Court, to be so construed as to give them jurisdiction in a case in which the sovereign power had implicitly consented to waive its jurisdiction.

The court came to the conclusion, that the vessel in question being a public armed ship, in the service of a foreign sovereign with whom the United States were at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory under an implied promise that, while necessarily within it and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.[1]

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vernement étranger. Il a été jugé qu' une personne ne peut former en France une saisie-arrêt sur les fonds d'un gouvernement étranger, et que les tribunaux sont incompétents pour statuer sur la validité de cette saisie-arrêt." Fœlix, Droit International Privé, § 164.]

[1] Cranch's Rep. vol. vii. pp. 135–147. The Schooner Exchange *v.* McFadden and others.

Law of France, as to the exemption of private vessels from the local jurisdiction.

The maritime jurisprudence of France, in respect to foreign private vessels entering the French ports for the purposes of trade, appears to be inconsistent with the principles established in the above judgment of the Supreme Court of the United States; or, to speak more correctly, the legislation of France waives, in favor of such vessels, the exercise of the local jurisdiction to a greater extent than appears to be imperatively required by the general principles of international law. As it depends on the option of a nation to annex any conditions it thinks fit to the admission of foreign vessels, public or private, into its ports, so it may extend, to any degree it may think fit, the immunities to which such vessels, entering under an implied license, are entitled by the general law and usage of nations.

The law of France, in respect to offences and torts committed on board foreign merchant vessels in French ports, establishes a twofold distinction between:

1. Acts of mere interior discipline of the vessel, or even crimes and offences committed by a person forming part of its officers and crew, against another person belonging to the same, where the peace of the port is not thereby disturbed.

2. Crimes and offences committed on board the vessel against persons not forming part of its officers and crew, or by any other than a person belonging to the same, or those committed by the officers and crew upon each other, if the peace of the port is thereby disturbed.

In respect to acts of the first class, the French tribunals decline taking jurisdiction. The French law declares that the rights of the power, to which the vessel belongs, should be respected, and that the local authority should not interfere, unless its aid is demanded. These acts, therefore, remain under the police and jurisdiction of the State to which the vessel belongs. In respect to those of the second class, the local jurisdiction is asserted by those tribunals. It is based on the principle, that the protection accorded to foreign merchantmen in the French ports cannot divest the territorial jurisdiction, so far as the interests of the State are affected; that a vessel admitted into a port of the State is of right subjected to the police regulations of the place; and that its crew are amenable to the tribunals of the country for offences committed on board of it against per-

sons not belonging to the ship, as well as in actions for civil contracts entered into with them; that the territorial jurisdiction for this class of cases is undeniable.

It is on these principles that the French authorities and tribunals act, with regard to merchant ships lying within their waters. The grounds upon which the jurisdiction is declined in one class of cases, and asserted in the other, are stated in a decision of the Council of State, pronounced in 1806. This decision arose from a conflict of jurisdiction between the local authorities of France and the American consuls in the French ports, in the two following cases:

The first case was that of the American merchant vessel, The Newton, in the port of Antwerp; where the American consul and the local authorities both claimed exclusive jurisdiction over an assault committed by one of the seamen belonging to the crew against another, in the vessel's boat. The second was that of another American vessel, The Sally, in the port of Marseilles, where exclusive jurisdiction was claimed both by the local tribunals and by the American consul, as to a severe wound inflicted by the mate on one of the seamen, in the alleged exercise of discipline over the crew. The Council of State pronounced against the jurisdiction of the local tribunals and authorities in both cases, and assigned the following reasons for its decision:

"Considering that a neutral vessel cannot be indefinitely regarded as a neutral place, and that the protection granted to such vessels in the French ports cannot oust the territorial jurisdiction, so far as respects the public interests of the State; that, consequently, a neutral vessel admitted into the ports of the State is rightfully subject to the laws of the police of that place where she is received; that her officers and crew are also amenable to the tribunals of the country for offences and torts[1] committed by them, even on board the vessel, against other persons than those belonging to the same, as well as for civil contracts made with them; but that, in respect to offences and torts committed on board the vessel, by one of the officers and crew against another, the rights of the neutral power ought to be

[1] The term used in the original is *délits*, which includes every wrong done to the prejudice of individuals, whether they be *délits publics* or *délits privés*.

respected, as exclusively concerning the internal discipline of the vessel, in which the local authorities ought not to interfere, unless their protection is demanded, or the peace and tranquillity of the port is disturbed; the Council of State is of opinion that this distinction, indicated in the report of the Grand Judge, Minister of Justice, and conformable to usage, is the only rule proper to be adopted, in respect to this matter; and applying this doctrine to the two specific cases in which the consuls of the United States have claimed jurisdiction; considering that one of these cases was that of an assault committed in the boat of the American ship Newton, by one of the crew upon another, and the other case was that of a severe wound inflicted by the mate of the American ship Sally upon one of the seamen, for having made use of the boat without leave; is of opinion that the jurisdiction claimed by the American consuls ought to be allowed, and the French tribunals prohibited from taking cognizance of these cases."[1] (*a*)

Exemption of public or private ves-

Whatever may be the nature and extent of the exemption of the public or private vessels of one State

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[1] Ortolan, Régles Internationales de la Mer, tome i. pp. 293–298. Appendice, Annexe II. p. 441.

(*a*) [See Rev. Etr. & Fr. N. S. t. ii. p. 206, for a review of Ortolan's work, by Mr. Wheaton, in which this subject is discussed. The Convention of February 23, 1853, Art. 8, between France and the United States, *vide infra*, adopts, as to acts of interior discipline, the principle of the French law, and submits all such matters to the consuls, to the exclusion of the local authorities.

As to whether the local authorities, in a foreign port, have a right to interfere with the condition of persons or things, on board of a merchant vessel, as established by the laws of the country to which it belongs, and especially whether they can do so when such vessel has been brought into the port by unlawful force, see the correspondence between Mr. Webster and Lord Ashburton, in the case of The Creole. Webster's Works, vol. vi. p. 303, and the note of the Attorney-General, Mr. Legaré, to Lord Ashburton, July 20, 1842. Opinions of Attorneys-General, vol. iv. p. 98. Also an article on the same case by Mr. Wheaton. Rev. Étr. et Franç. tom. ix. p. 345.

No adjustment having been made, during the negotiations of 1842, of the cases arising out of the liberation of American slaves, in the Bahama and Bermuda islands, by their respective authorities, from vessels forced in to escape shipwreck, or actually shipwrecked, they have been brought before the joint commission, now sitting in London, under the Convention of February 8, 1853, (United States Treaties, 1853–4, p. 110.) for the settlement of all claims of the subjects of Great Britain on the government of the United States, and of the citizens of the United

from the local jurisdiction in the ports of another, it is evident that this exemption, whether express or implied, can never be construed to justify acts of hostility committed by such vessel, her officers, and crew, in violation of the law of nations, against the security of the State in whose ports she is received, or to exclude the local tribunals and authorities from resorting to such measures of self-defence as the security of the State may require.

sels from the local jurisdiction does not extend to justify acts of aggression against the security of the State.

This just and salutary principle was asserted by the French Court of Cassation, in 1832, in the case of the private Sardinian steam-vessel, The Carlo Alberto which, after having landed on the southern coast of France the Duchess of Berry and several of her adherents, with the view of exciting civil war in that country, put into a French port in distress. The judgment of the Court, pronounced upon the *conclusions* of M. Dupin ainé, Procureur-Général, reversed the decision of the inferior tribunal, releasing the prisoners taken on board the vessel, upon the following grounds:

1. That the principle of the law of nations, according to which a foreign vessel, allied or neutral, is considered as forming part of the territory of the nation to which it belongs, and consequently is entitled to the privilege of the same inviolability with the territory itself, ceases to protect a vessel which commits acts of hostility in the French territory, inconsistent with its character of ally, or neutral; as if, for example, such vessel be chartered to serve as an instrument of conspiracy against the safety of the State, and after having landed some of the persons concerned in these acts, still continues to hover near the coast, with the rest of the conspirators on board, and at last puts into port under pretext of distress.

2. That supposing such allegation of distress be founded in fact, it could not serve as a plea to exclude the jurisdiction of the local tribunals, taking cognizance of a charge of high treason

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States on that of Great Britain, presented to either government for its interposition with the other, since the treaty of Ghent, of 24th of December, 1814. The American and English commissioners not being able to agree on these claims, they have been referred, according to the provisions of the treaty, to the umpire, whose decision is final. Letter of the Commissioner of the United States, Mr. Upham, September 27, 1854.]

against the persons found on board, after the vessel was compelled to put into port by stress of weather.[1]

The exemption of public ships from the local jurisdiction does not extend to their prize goods taken in violation of the neutrality of the country into which they are brought.

So also it has been determined by the Supreme Court of the United States, that the exemption of foreign public ships, coming into the waters of a neutral State, from the local jurisdiction, does not extend to their prize ships, or goods captured by armaments fitted out in its ports, in violation of its neutrality, and of the laws enacted to enforce that neutrality.

Such was their judgment in the case of the Spanish ship Santissima Trinidad, from which the cargo had been taken out, on the high seas, by armed vessels commissioned by the United Provinces of the Rio de la Plata, and fitted out in the ports of the United States in violation of their neutrality. The tacit permission, in virtue of which the ships of war of a friendly power are exempt from the jurisdiction of the country, cannot be so interpreted as to authorize them to violate the rights of sovereignty of the State, by committing acts of hostility against other nations, with an armament supplied in the ports, where they seek an asylum. In conformity with this principle, the court ordered restitution of the goods claimed by the Spanish owners, as wrongfully taken from them.[2]

§ 10. Jurisdiction of the State over its public and private vessels on the high seas.

4. Both the public and private vessels of every nation, on the high seas, and out of the territorial limits of any other State, are subject to the jurisdiction of the State to which they belong.

Vattel says that the domain of a nation extends to all its just possessions; and by its possessions we are not to understand its territory only, but all the rights (droits) it enjoys. And he also considers the vessels of a nation on the high seas as portions of its territory. Grotius holds that sovereignty may be acquired over a portion of the sea, *ratione personarum, ut si classis qui maritimus est exercitus, aliquo in loco*

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1 Sirey, Recueil général de Jurisprudence, tome xxxii. Partie I. p. 578. M. Dupin aîné has published his learned and eloquent pleading in this memorable case, in his *Collection des Réquisitoires*, tome i. p. 447.

2 Wheaton's Rep. vol. vii. p. 352. The Santissima Trinidad.

maris se habeat. But, as one of his commentators, Rutherforth has observed, though there can be no doubt about the jurisdiction of a nation over the persons which compose its fleets when they are out at sea, it does not follow that the nation has jurisdiction over any portion of the ocean itself. It is not a permanent property which it acquires, but a mere temporary right of occupancy in a place which is common to all mankind, to be successively used by all as they have occasion.[1]

This jurisdiction which the nation has over its public and private vessels on the high seas, is exclusive only so far as respects offences against its own municipal laws. Piracy and other offences against the law of nations, being crimes not against any particular State, but against all mankind, may be punished in the competent tribunal of any country where the offender may be found, or into which he may be carried, although committed on board a foreign vessel on the high seas.[2]

Though these offences may be tried in the competent court of any nation having, by lawful means, the custody of the offenders, yet the right of visitation and search does not exist in time of peace. This right cannot be employed for the purpose of executing upon foreign vessels and persons on the high seas the prohibition of a traffic, which is neither piratical nor contrary to the law of nations, (such, for example, as the slave trade,) unless the visitation and search be expressly permitted by international compact.[3]

Every State has an incontestable right to the service of all its members in the national defence, but it can give effect to this right only by lawful means. Its right to reclaim the military service of its citizens can be exercised only within its own territory, or in some place not subject to the jurisdiction of any other nation. The ocean is such a place, and any State may unquestionably there exercise, on board its own vessels, its right of compelling the military or naval services of its subjects. But whether it may

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[1] Vattel, liv. i. ch. 19, § 216, liv. ii. ch. 7, § 80. Grotius, de Jur. Bel. ac. Pac. lib. ii. cap. iii. § 13. Rutherforth's Inst. vol. ii. b. 2, ch. 9, §§ 8, 19.

[2] Sir L. Jenkin's Works, vol. i. p. 714.

[3] Dodson's Adm. Rep. vol. ii. p. 238. The Louis. Wheaton's Rep. vol. x. pp. 122, 123. The Antelope. Wheat. Rep. vol. xi. pp. 39, 40, The Marianna Flora, *et vide infra*, § 15.

exercise the same right in respect to the vessels of other nations, is a question of more difficulty.

In respect to public commissioned vessels belonging to the State, their entire immunity from every species and purpose of search is generally conceded. As to private vessels belonging to the subjects of a foreign nation, the right to search them on the high seas, for deserters and other persons liable to military and naval service, has been uniformly asserted by Great Britain, and as constantly denied by the United States. This litigation between the two nations, who by the identity of their origin and language are the most deeply interested in the question, formed one of the principal objects of the late war between them. It is to be hoped that the sources of this controversy may be dried up by the substitution of a registry of seamen, and a system of voluntary enlistment with limited service, for the odious practice of impressment which has hitherto prevailed in the British navy, and which can never be extended, even to the private ships of a foreign nation, without provoking hostilities on the part of any maritime State capable of resisting such a pretension.[1]

The subject was incidentally passed in review, though not directly treated of, in the negotiations which terminated in the treaty of Washington, 1842, between the United States and Great Britain. In a letter addressed by the American negotiator to the British plenipotentiary on the 8th August, 1842, it was stated that no cause had produced, to so great an extent, and for so long a period, disturbing and irritating influences on the political relations of the United States and England, as the impressment of seamen by the British cruisers from American merchant vessels.

From the commencement of the French revolution to the breaking out of the war between the two countries in 1812, hardly a year elapsed without loud complaint and earnest remonstrance. A deep feeling of opposition to the right claimed, and to the practice exercised under it, and not unfrequently exercised without the least regard to what justice and humanity would have dictated, even if the right itself had been ad-

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[1] Edinburgh Review, vol. xi. art. 1. Mr. Canning's Letter to Mr. Monroe, September 23, 1807. American State Papers, vol. vi. p. 103.

mitted, took possession of the public mind of America, and this feeling, it was well known, coöperated with other causes to produce the state of hostilities which ensued.

At different periods, both before and since the war, negotiations had taken place between the two governments, with the hope of finding some means of quieting these complaints. Sometimes the effectual abolition of the practice had been requested and treated of; at other times, its temporary suspension; and, at other times, again, the limitation of its exercise and some security against its enormous abuses.

A common destiny had attended these efforts: they had all failed. The question stood at that moment where it stood fifty years ago. The nearest approach to a settlement was a convention, proposed in 1803, and which had come to the point of signature, when it was broken off in consequence of the British government insisting that the "Narrow Seas" should be expressly excepted out of the sphere over which the contemplated stipulations against impressment should extend. The American minister, Mr. King, regarded this exception as quite inadmissible, and chose rather to abandon the negotiation than to acquiesce in the doctrine which it proposed to establish.

England asserted the right of impressing British subjects. She asserted this as a legal exercise of the prerogative of the crown; which prerogative was alleged to be founded on the English law of the perpetual and indissoluble allegiance of the subject, and his obligation, under all circumstances, and for his whole life, to render military service to the crown whenever required.

This statement, made in the words of eminent British jurists, showed at once that the English claim was far broader than the basis on which it was raised. The law relied on was English law; the obligations insisted on were obligations between the crown of England and its subjects. This law and these obligations, it was admitted, might be such as England chose they should be. But then they must be confined to the parties. Impressment of seamen, out of and beyond the English territory, and from on board the ships of other nations, was an interference with the rights of other nations; it went, therefore, further than English prerogative could legally extend; and was nothing but an attempt to enforce the peculiar law of England beyond the dominions and jurisdiction of the crown. The claim asserted an

extra-territorial authority for the law of British prerogative, and assumed to exercise this extra-territorial authority, to the manifest injury of the citizens and subjects of other States, on board their own vessels, on the high seas.

Every merchant vessel on those seas was rightfully considered as part of the territory of the country to which it belonged. The entry, therefore, into such vessel, by a belligerent power, was an act of force, and was, *primâ facie*, a wrong, a trespass which could be justified only when done for some purpose allowed to form a sufficient justification by the law of nations. But a British cruiser enters an American vessel in order to take therefrom supposed British subjects; offering no justification therefor under the law of nations, but claiming the right under the law of England respecting the king's prerogative. This could not be defended. English soil, English territory, English jurisdiction, was the appropriate sphere for the operation of English law. The ocean was the sphere of the law of nations; and any merchant vessel on the high seas was, by that law, under the protection of the laws of her own nation, and might claim immunity, unless in cases in which that law allows her to be entered or visited.

If this notion of perpetual allegiance, and the consequent power of the prerogative, were the law of the world; if it formed part of the conventional code of nations, and was usually practised, like the right of visiting neutral ships, for the purpose of discovering and seizing enemy's property; then impressment might be defended as a common right, and there would be no remedy for the evil until the international code should be altered. But this was by no means the case. There was no such principle incorporated into the code of nations. The doctrine stood only as English law, not as international law; and English law could not be of force beyond English dominion. Whatever duties or relations that law creates between the sovereign and his subjects, could only be enforced within the realm, or within the proper possessions or territory of the sovereign. There might be quite as just a prerogative right to the property of subjects as to their personal services, in an exigency of the State; but no government thought of controlling, by its own laws, the property of its subjects situated abroad; much less did any government think of entering the territory of another power, for the purpose of seizing such property and

appropriating it to its own use. As laws, the prerogatives of the crown of England have no obligation on persons or property domiciled or situated abroad.

"When, therefore," says an authority not unknown or unregarded on either side of the Atlantic, "we speak of the right of a State to bind its own native subjects everywhere, we speak only of its own claim and exercise of sovereignty over them, when they return within its own territorial jurisdiction, and not of its right to compel or require obedience to such laws on the part of other nations, within their own territorial sovereignty. On the contrary, every nation has an exclusive right to regulate persons and things within its own territory, according to its sovereign will and public polity."

But impressment was subject to objections of a much wider range. If it could be justified in its application to those who are declared to be its only objects, it still remained true that, in its exercise, it touched the political rights of other governments, and endangered the security of their own native subjects and citizens. The sovereignty of the State was concerned in maintaining its exclusive jurisdiction and possession over its merchant ships on the seas, except so far as the law of nations justifies intrusion upon that possession for special purposes; and all experience had shown that no member of a crew, wherever born, was safe against impressment when a ship was visited.

In the calm and quiet which had succeeded the late war, a condition so favorable for dispassionate consideration, England herself had evidently seen the harshness of impressment, even when exercised on seamen in her own merchant service; and she had adopted measures, calculated if not to renounce the power or to abolish the practice, yet, at least, to supersede its necessity, by other means of manning the royal navy, more compatible with justice and the rights of individuals, and far more conformable to the principles and sentiments of the age.

Under these circumstances, the government of the United States had used the occasion of the British minister's pacific mission to review the whole subject, and to bring it to his notice and to that of his government. It had reflected on the past, pondered the condition of the present, and endeavored to anticipate, so far as it might be in its power, the probable future; and the

American negotiator communicated to the British minister the following, as the result of those deliberations.

The American government, then, was prepared to say that the practice of impressing seamen from American vessels could not hereafter be allowed to take place. That practice was founded on principles which it did not recognize, and was invariably attended by consequences so unjust, so injurious, and of such formidable magnitude, as could not be submitted to.

In the early disputes between the two governments, on this so long contested topic, the distinguished person to whose hands were first intrusted the seals of the Department of State declared, that "the simplest rule will be, that the vessel being American shall be evidence that the seamen on board are such."

Fifty years' experience, the utter failure of many negotiations, and a careful reconsideration of the whole subject when the passions were laid, and no present interest or emergency existed to bias the judgment, had convinced the American government that this was not only the simplest and best, but the only rule, which could be adopted and observed, consistently with the rights and honor of the United States, and the security of their citizens. That rule announced, therefore, what would hereafter be the principle maintained by their government. In every regularly documented American merchant vessel, the crew who navigated it would find their protection in the flag which was over them.[1] (*a*)

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[1] Wheaton's Hist. Law of Nations, pp. 737–746. Mr. Webster's Letter to Lord Ashburton, August 8, 1842.

(*a*) [In the negotiations of 1823, the American Minister was authorized, if Great Britain would agree to abolish impressment, to stipulate to exclude all natural-born subjects of the belligerent party not naturalized before the commencement of a war, from the public and private naval service of the neutral, and even to extend the exclusion to all those naturalized after the exchange of the ratifications of the treaty. Mr. Adams, Secretary of State, to Mr. Rush, July 28, 1823. Cong. Doc. 18 Cong. 2 Sess., Senate, Confidential, p. 54.

Similar instructions had been given to the Commissioners at Ghent, and, with the express view of meeting the case, the 12th section of the Act of 3d March, 1813, (U. S. Stat. at Large, vol. ii. p. 811,) "for the regulation of seamen on board the public and private vessels of the United States," had provided that no person subsequently arriving in the United States should be admitted to

§ 11. Consular jurisdiction.

IV. The municipal laws and institutions of any State may operate beyond its own territory, and within the territory of another State, by special compact between the two States.

Such are the treaties by which the consuls and other commercial agents of one nation are authorized to exercise, over their own countrymen, a jurisdiction within the territory of the State

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become a citizen who should not, for *the continued term of five years next preceding his admission, have resided in the United States, without being, at any time during the said five years, out of the territory of the United States.* Looking to the habits of life of seamen, this provision was deemed entirely equivalent to the total prohibition of their naturalization, and was intended to meet the suggestions made during the negotiations of 1806, between Lord Holland and Lord Aukland and Mr. Monroe and Mr. Pinkney — when it was proposed that it should be made penal for British commanders to impress American citizens from on board of American vessels on the high seas, and for officers of the United States to grant certificates of citizenship to British subjects. American State Papers, vol. vi. p. 323. This arrangement was again brought forward, at the time of the proposed armistice, at the commencement of the war, by Mr. Russell, in a conference with Lord Castlereagh, when the entire exclusion of all subsequently naturalized citizens was offered by us, as a consideration for the discontinuance of the practice of impressment. Id. vol. ix. p. 147.

Impressment was also one of the numerous subjects confided to Mr. Gallatin, in 1826. In consequence, however, of what had previously occurred, that eminent diplomatist, though authorized to receive and discuss, was not permitted to make any new proposals; and he found that, "though Mr. Canning (who was then Premier) was, as Lord Castlereagh had been, ahead of public opinion or national pride, he did not feel himself quite strong enough to encounter those sentiments, and to give new arms to his adversaries; and notwithstanding his conviction that an agreement, such as he might expect, was extremely desirable, he was not prepared, at that time, to make the proposal." Mr. Gallatin to Mr. Clay, Secretary of State, 28th July, 1827. After the departure of Mr. Gallatin, an intimation was given, by Lord Dudley, of the disposition of the Ministry, of which the Duke of Wellington had then become the head, to enter into an arrangement on the basis, on which it was understood that the United States were willing to treat. This suggestion of the British Secretary for Foreign Affairs was duly communicated to the government, at Washington, though without resulting in any new negotiation. Mr. Lawrence, Chargé d'Affaires, to Mr. Clay, April 5, 1828. MS. Despatches. But, though not brought again to the notice of the British government, the provision of the Act of 1813, which was equivalent to a practical prohibition to naturalize foreign seamen, remained on our statute-book as a means to conciliate the pretensions of England with the immunity of our flag, till the 26th of June, 1848, when the condition of continuous residence was stricken out of the law. U. S. Stat. at Large, vol. ix. p. 240.]

where they reside. The nature and extent of this peculiar jurisdiction depend upon the stipulations of the treaties between the two States. Among Christian nations it is generally confined to the decision of controversies in civil cases, arising between the merchants, seamen, and other subjects of the State, in foreign countries; to the registering of wills, contracts, and other instruments executed in presence of the consul; and to the administration of the estates of their fellow-subjects, deceased within the territorial limits of the consulate. The resident consuls of the Christian powers in Turkey, the Barbary States, and other Mohammedan countries, exercise both civil and criminal jurisdiction over their countrymen, to the exclusion of the local magistrates and tribunals. This jurisdiction is ordinarily subject, in civil cases, to an appeal to the superior tribunals of their own country. The criminal jurisdiction is usually limited to the infliction of pecuniary penalties; and, in offences of a higher grade, the functions of the consul are similar to those of a police magistrate, or *juge d'instruction*. He collects the documentary and other proofs, and sends them, together with the prisoner, home to his own country for trial.[1]

By the treaty of peace, amity, and commerce, concluded at Wang Hiya, 1844, between the United States and the Chinese Empire, it is stipulated, art. 21, that "citizens of the United States, who may commit any crime in China, shall be subject to be tried and punished only by the consul, or other public functionary of the United States thereto authorized, according to the laws of the United States." Art 25. "All questions in regard to rights, whether of property or of person, arising between citizens of the United States in China shall be subject to the jurisdiction, and regulated by the authorities, of their own government. And all controversies occurring in China, between citizens of the United States and the subjects of any other government, shall be

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[1] De Steck, Essai sur les Consuls, sect. vii. §§ 30–40. Pardessus, Droit Commercial, Pt. VI. tit. 6, ch. 2, § 2, ch. 4, §§ 1, 2, 3. Miltitz, Manuel des Consuls, tome ii. Partie 2, pp. 102–135, 70–78, 162–201, 695–779, 853–866. The various treaties between the United States and foreign powers, by which the functions and privileges of consuls are reciprocally regulated, will be found accurately enumerated and fully analyzed in the above treatise of Baron de Miltitz, tome ii. Part II. pp. 1498–1598.

regulated by the treaties existing between the United States and such governments respectively, without interference on the part of China." (*a*)

(*a*) [In the treaties between the United States and Great Britain, there is no other provision respecting consuls than that contained in the 4th article of the Commercial Convention of 1815, which merely stipulates that it shall be free to each party to appoint consuls, to reside, for the protection of trade, in the dominions of the other; but requires that, before any one acts, he shall be approved and admitted by the government to which he is sent. In case of illegal or improper conduct, the consul is to be punished according to law, if the laws will reach the case, or be sent back; the offended government assigning to the other the reasons for the same. U. S. Statutes at Large, vol. viii. p. 230.

For consuls to engage in commerce, is at variance with the policy of some of the European governments, particularly France and England; which, in general, accord to their commercial agents fixed salaries, in addition to fees, — the only mode in which, except in special cases, American consuls are compensated. There is, moreover, a provision in several of the treaties which stipulate for consuls the privileges accorded to those of the most favored nation, that if they shall exercise commerce, they shall be subjected to the same laws and usages to which private individuals are subject in the same place, in respect to their business.

As the Convention of 23d February, 1853, with France, is peculiar, not only for the provision which it makes as to aliens holding real property in the States of the Union, and in extending the consular jurisdiction over the merchant vessels of the respective countries, according to the principles of the French law, but in other particulars, it is here inserted.

ARTICLE I. The consuls-general, consuls, and vice-consuls, or consular agents of the United States and France shall be reciprocally received and recognized, on the presentation of their commissions, in the form established in their respective countries. The necessary exequatur, for the exercise of their functions, shall be furnished to them without charge; and, on the exhibition of this exequatur, they shall be admitted at once, and without difficulty, by the territorial authorities, federal or state, judicial or executive, of the ports, cities, and places of their residence and district, to the enjoyment of the prerogatives reciprocally granted. The government that furnishes the exequatur reserves the right to withdraw it, on a statement of the reasons for which it has thought proper to do so.

ART. II. The consuls-general, consuls, vice-consuls, or consular agents of the United States and France shall enjoy, in the two countries, the privileges usually accorded to their offices; such as personal immunity, except in the case of crime; exemption from military billetings, from service in the militia, or the national guard, and other duties of the same nature; and from all direct and personal taxation, whether federal, state, or municipal. If, however, the said consuls-general, consuls, vice-consuls, or consular agents are citizens of the country in which they reside; if they are, or become owners of property there, or engage in commerce, they shall be subject to the same taxes and imposts, and,

§ 12. Independence of the State, as to its judicial power.

Every sovereign State is independent of every other, in the exercise of its judicial power.

This general position must, of course, be qualified by the exceptions to its application, arising out of express

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with the reservation of the treatment granted to commercial agents, to the same jurisdiction as other citizens of the country, who are owners of property, or merchants.

They may place, on the outer door of their offices, or of their dwelling-houses, the arms of their nation, with an inscription in these words: "Consul of the United States," or "Consul of France;" and they shall be allowed to hoist the flag of their country thereon.

They shall never be compelled to appear as witnesses before the courts. When any declaration for judicial purposes, or deposition, is to be received from them, in the administration of justice, they shall be invited, in writing, to appear in court, and, if unable to do so, their testimony shall be requested in writing, or be taken orally at their dwellings.

Consular pupils shall enjoy the same personal privileges and immunities as consuls-general, consuls, vice-consuls, or consular agents.

In case of death, indisposition, or absence of the latter, the chancellors, secretaries, and consular pupils attached to their offices, shall be entitled to discharge, *ad interim*, the duties of their respective posts; and shall enjoy, whilst thus acting, the prerogatives granted to the incumbents.

ART. III. The consular offices and dwellings shall be inviolable. The local authorities shall not invade them under any pretext. In no case shall they examine or seize the papers there deposited. In no case shall those offices or dwellings be used as places of asylum.

ART. IV. The consuls-general, consuls, vice-consuls, or consular agents of both countries shall have the right to complain to the authorities of the respective governments, whether federal or local, judicial or executive, throughout the extent of their consular district, of any infraction of the treaties or conventions existing between the United States and France, or for the purpose of protecting informally the rights and interests of their countrymen, especially in cases of absence. Should there be no diplomatic agent of their nation, they shall be authorized, in case of need, to have recourse to the general or federal government of the country in which they exercise their functions.

ART. V. The respective consuls-general and consuls shall be free to establish, in such parts of their districts as they may see fit, vice-consuls, or consular agents, who may be taken indiscriminately from among Americans of the United States, Frenchmen, or citizens of other countries. These agents, whose nomination, it is understood, shall be submitted to the approval of the respective governments, shall be provided with a certificate given to them by the consul by whom they are named, and under whose orders they are to act.

ART. VI. The consuls-general, consuls, vice-consuls, or consular agents shall have the right of taking, at their offices or bureaus, at the domicile of the par-

compact, such as conventions with foreign States, and acts of confederation, by which the State may be united in a league with

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ties concerned, or on board ship, the declarations of captains, crews, passengers, merchants, or citizens of their country, and of executing there all requisite papers.

The respective consuls-general, consuls, vice-consuls, or consular agents shall have the right, also, to receive at their offices or bureaus, conformable to the laws and regulations of their country, all acts of agreement executed between the citizens of their own country and the citizens or inhabitants of the country in which they reside, and even all such acts between the latter, provided that these acts relate to property situated, or to business to be transacted, in the territory of the nation to which the consul or the agent, before whom they are executed, may belong.

Copies of such papers, duly authenticated by the consuls-general, consuls, vice-consuls, or consular agents, and sealed with the official seal of their consulate or consular agency, shall be admitted in courts of justice throughout the United States and France, in like manner as the originals.

ART. VII. In all the States of the Union, whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property, by the same title and in the same manner as the citizens of the United States. They shall be free to dispose of it as they may please, either gratuitously or for value received, by donation, testament, or otherwise, just as those citizens themselves; and in no case shall they be subjected to taxes on transfer, inheritance, or any others different from those paid by the latter, or to taxes which shall not be equally imposed.

As to the States of the Union by whose existing laws aliens are not permitted to hold real estate, the President engages to recommend to them the passage of such laws as may be necessary, for the purpose of conferring this right.

In like manner, but with the reservation of the ulterior right of establishing reciprocity in regard to possession and inheritance, the government of France accords to the citizens of the United States the same rights within its territory, in respect to real and personal property, and to inheritance, as are enjoyed there by its own citizens.

ART. VIII. The respective consuls-general, consuls, vice-consuls, or consular agents shall have exclusive charge of the internal order of the merchant vessels of their nation, and shall alone take cognizance of differences which may arise, either at sea or in port, between the captain, officers, and crew, without exception, particularly in reference to the adjustment of wages and the execution of contracts. The local authorities shall not, on any pretext, interfere in these differences; but shall lend forcible aid to the consuls, when they may ask it, to arrest and imprison all persons composing the crew whom they may deem it necessary to confine. Those persons shall be arrested at the sole request of the consuls, addressed in writing to the local authority, and supported by an official extract from the register of the ship or list of the crew, and shall be held, during

other States, for some common purpose. By the stipulations of these compacts, it may part with certain portions of its judicial

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the whole time of their stay in the port, at the disposal of the consuls. Their release shall be granted at the mere request of the consuls, made in writing. The expenses of the arrest and detention of those persons shall be paid by the consuls.

ART. IX. The respective consuls-general, consuls, vice-consuls, or consular agents, may arrest the officers, sailors, and all other persons making part of the crews of ships of war, or merchant vessels of their nation, who may be guilty or be accused of having deserted said ships and vessels, for the purpose of sending them on board, or back to their country. To that end, the consuls of France in the United States shall apply to the magistrates designated in the Act of Congress of May 4, 1826; that is to say, indiscriminately to any of the federal, state, or municipal authorities; and the consuls of the United States in France shall apply to any of the competent authorities, and make a request in writing for the deserters, supporting it by an exhibition of the registers of the vessel and list of the crew, or by other official documents, to show that the men whom they claim belonged to said crew. Upon such request alone, thus supported, and without the exaction of any oath from the consuls, the deserters, not being citizens of the country where the demand is made, either at the time of their shipping or of their arrival in the port, shall be given up to them. All aid and protection shall be furnished them, for the pursuit, seizure, and arrest of the deserters, who shall even be put and kept in the prisons of the country, at the request and at the expense of the consuls, until these agents may find an opportunity of sending them away. If, however, such opportunity should not present itself within the space of three months, counting from the day of the arrest, the deserters shall be set at liberty, and shall not again be arrested for the same cause.

ART. X. The respective consuls-general, consuls, vice-consuls, or consular agents, shall receive the declarations, protests, and reports of all captains of vessels of their nation, in reference to injuries experienced at sea; they shall examine and take note of the stowage; and when there are no stipulations to the contrary between the owners, freighters, or insurers, they shall be charged with the repairs. If any inhabitants of the country in which the consuls reside, or citizens of a third nation, are interested in the matter, and the parties cannot agree, the competent local authority shall decide.

ART. XI. All proceedings relative to the salvage of American vessels wrecked upon the coasts of France, and of French vessels wrecked upon the coasts of the United States, shall be respectively directed by the consuls-general, consuls, and vice-consuls of the United States in France, and by the consuls-general, consuls, and vice-consuls of France in the United States, and, until their arrival, by the respective consular agents, wherever an agency exists. In the places and ports where an agency does not exist, the local authorities, until the arrival of the consul in whose district the wreck may have occurred, and who shall be immediately informed of the occurrence, shall take all necessary measures for the protection of persons and the preservation of property.

power, or may modify its exercise with a view to the attainment of the object of the treaty or act of union.

The local authorities shall not otherwise interfere than for the maintenance of order, the protection of the interests of the salvors, if they do not belong to the crews that have been wrecked, and to carry into effect the arrangements made for the entry and exportation of the merchandise saved.

It is understood that such merchandise shall not be subjected to any custom-house duty, if it is to be reëxported, and, if it be entered for consumption, a diminution of such duty shall be allowed, in conformity with the regulations of the respective countries.

ART. XII. The respective consuls-general, consuls, vice-consuls, or consular agents, as well as their consular pupils, chancellors, and secretaries, shall enjoy in the two countries all the other privileges, exemptions, and immunities, which may at any future time be granted to the agents of the same rank of the most favored nation.

ART. XIII. The present convention shall remain in force for the space of ten years from the day of the exchange of the ratifications, which shall be made in conformity with the respective constitutions of the two countries, and exchanged at Washington within the period of six months, or sooner, if possible. In case neither party gives notice, twelve months before the expiration of the said period of ten years, of its intention not to renew the convention, it shall remain in force a year longer, and so on from year to year, until the expiration of a year from the day on which one of the parties shall give such notice. Treaties of the United States, 1854, p. 114.

Besides the provision in the treaty with France, the United States have treaties with Belgium, Brazil, the Hanseatic Towns, Central America, Chili, Ecuador, Greece, Hanover, Mexico, Peru-Bolivia, Portugal, Prussia, Russia, Sardinia, Spain, Sweden, Venezuela, and Austria, reciprocally authorizing the arrest, in their respective ports, of any sailors who have deserted from the public or private vessels of the other of the contracting parties, and stipulating for the aid of the local authorities for their apprehension. See U. S. Statutes at Large, vols. viii. and ix. To give effect to the provision on this subject in the Treaty of 1822, with France, the Act of May 4, 1826, referred to in the recent treaty, was passed, (U. S. Statutes at Large, vol. iv. p. 160). A further act was also passed, March 21, 1829, which applies to all cases of foreign governments having treaties with the United States, stipulating for the restoration of seamen. This law makes it the duty of all courts having jurisdiction to issue warrants for the examination of the persons charged; and if, on examination, the facts stated are found to be true, such person, not being a citizen of the United States, shall be delivered to the consul, to be sent back to the dominions of his government. Id. p. 360. Our treaty with China, art. 29th, provides for the apprehension and delivery to the consuls, by the local authorities, of all mutineers or deserters from on board of vessels of the United States in China. Id. vol. viii. p. 598.

In the Treaty of 1828, with Prussia, art. 10, (U. S. Statutes at Large, vol. viii. p. 382,) there is a provision, that the consuls, vice-consuls, and commercial

Subject to these exceptions, the judicial power of every State is coextensive with its legislative power. At the same time, it

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agents, shall have a right, as such, to sit as judges and arbitrators, in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities; unless the conduct of the crews or of the captain should disturb the order or tranquillity of the country, or the consuls should require their assistance. An Act of Congress, passed 8th of August, 1846, for carrying into effect the provisions of this and similar treaties, gives authority to the Circuit and District Courts of the United States, and the commissioners appointed by them, to issue the necessary process to enforce the award, arbitration, or decree of the consul. U. S. Statutes at Large, vol. ix. p. 79. A provision similar to that in the treaty with Prussia is to be found in the 12th art. of the Treaty of 1837, with Greece; 8th art. of the Treaty of 1832, with Russia; in the 9th art. of the Treaty of 1846, with Hanover; and in the 1st art. of the Treaty of 3d of April, 1852, between the United States and the Hanseatic Towns. See U. S. Stat. vols. viii. and ix. before cited, and Treaties of the U. S. 1854, p. 95.

The consuls of the Christian States of Europe have, throughout the Levant, for centuries, exercised jurisdiction over their countrymen, as well as over others under their protection, and controlled, to a greater or less degree, the relations of the Franks with the people of the country. The 20th and 21st articles of the Treaty of 1787, with Morocco, provide, that if any of the citizens of the United States, or *any persons under their protection*, should have disputes with each other, the consul should decide between the parties; and whenever the consul should require any aid or assistance from the government to enforce his decision, it should be immediately granted to him. The consul was also to assist at any trial against a citizen of the United States for killing or wounding a Moor, or against a Moor for killing or wounding an American citizen. U. S. Statutes at Large, vol. viii. p. 103. In the treaties which existed with the former Regency of Algiers, while the consul was to settle any disputes between citizens of the United States, those between subjects of the Regency and the United States were to be decided by the Dey in person; and between citizens of the United States and other powers having consuls at Algiers, by the respective consuls of the parties. U. S. Statutes, vol. viii. p. 135. Id. p. 227. Id. p. 247. The treaty with Tunis, of 1797, contains the same provision as the treaty with Morocco; and it also provides for the presence of the consul, in case of any commercial dispute between Americans and the subjects of the Dey. Id. p. 160. By the Treaty of 1830, with the Ottoman Porte, it is provided that the consuls and vice-consuls of the United States shall be furnished with *berats* or *firmans;* that in disputes and litigations between the subjects of the Porte and citizens of the United States, the parties shall not be heard nor judgment pronounced unless the American Dragoman is present; and all cases exceeding 500 piastres are to be submitted to the Sublime Porte. Even Americans who have committed offences are not to be arrested or put in prison by the local authorities; but they are to

does not embrace those cases in which the municipal institutions of another nation operate within the territory. Such are the

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be tried by the minister or consul, and punished according to the offence, — following, in this respect, the usage observed towards other Franks. U. S. Statutes at Large, vol. viii. p. 409.

An act was passed August 11, 1848, to carry into effect the provisions of the treaties with China and the Ottoman Porte, by vesting judicial powers in the commissioner and consuls in China and the minister and consuls in Turkey. The laws of the United States are extended over the citizens of the United States in China, and where they are deficient, the common law; and if neither the common law nor statutes of the United States furnish suitable remedies, the commissioner shall, by decrees and regulations which shall have the force of law, supply the deficiencies, such regulations and decrees to be transmitted to the President, to be laid before Congress. The decision of the consul, who, in cases of intricacy, or in criminal cases of importance, is to be aided in his judgment by one or more citizens of the United States, is subject, in civil cases, beyond a certain amount, to an appeal to the commissioner. The only capital cases are murder, and insurrection or rebellion against the Chinese government, and in all other cases the punishment is fine and imprisonment, with an appeal to the commissioner; and no person can be convicted of a crime punishable with death, unless the consul and his associates all concur in opinion, and the commissioner approves of the conviction. The commissioner and the consuls may call on the Chinese authorities to support them in the exercise of the powers confided to them. The provisions of the act, so far as they relate to crimes committed by citizens of the United States, are extended to Turkey, in conformity with the Treaty of 1830. U. S. Statutes at Large, vol. ix. p. 276. The powers and privileges understood to belong to the consuls of Christian powers in the Levant are thus stated: —

Les consuls dans le Levant et dans la Barbarie ont entière liberté de religion, et ont la permission de tenir des chapelles chez eux et d'admettre leurs compatriotes à l'exercice de leur culte. Leurs maisons sont des asiles inviolables. On ne peut ni les arrêter, ni les juger, mais s'ils abusaient de leur position, ils seraient renvoyés à leurs gouvernements. Ils ne sont point tenus de comparaître personnellement par-devant les tribunaux, où il suffit qu'ils envoient leurs drogmans. Ils peuvent librement sortir du pays quand ils veulent. On leur accorde gratuitement une garde de janissaires ou d'autres soldats. Aucune taxe, aucun impôt, n'est payé par eux, par leurs employés, ou par leurs domestiques. Ils n'ont pas de droits de douane à acquitter pour les effets à leur usage. Rien ne peut leur être confisqué ou retenu. Ils prennent connaissance des biens de leurs compatriotes décédés sans héritiers sur les lieux. En cas de naufrage, ils président à toutes les opérations de sauvetage et recueillent les objets sauvés. Ils sont juges naturels de leurs nationaux, sans que les autorités territoriales y interviennent, excepté dans le cas de la réquisition du consul lui-même. En cas de différend, ou bien lorsqu'un crime a été commis par un individu de leur nation sur un sujet du pays, l'autorité locale à laquelle en appartient la connaissance, ne

cases of a foreign sovereign, or his public minister, fleet, or army, coming within the territorial limits of another State, which, as already observed, are, in general, exempt from the operation of the local laws.[1]

§ 13. Extent of the judicial power over criminal offences.

I. The judicial power of every independent State, then, extends, with the qualifications mentioned, —

1. To the punishment of all offences against the municipal laws of the State, by whomsoever committed, within the territory.[2]

2. To the punishment of all such offences, by whomsoever committed, on board its public and private vessels on the high seas, and on board its public vessels in foreign ports.[3]

3. To the punishment of all such offences by its subjects, wheresoever committed.

4. To the punishment of piracy, and other offences against the law of nations, by whomsoever and wheresoever committed.[4]

It is evident that a State cannot punish an offence against its

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peut, dans la règle, ni procéder, ni prononcer jugement, sans la participation du consul et la coöpération de son interprète, présent à la procédure, pour défendre les intérêts de l'individu de sa nation. Ils peuvent recevoir sous leur protection tous les bâtiments ou les individus étrangers qui la leur demanderont. Si un individu qui est sous leur protection doit être arrêté, ils peuvent, en s'en rendant cautions, le reclamer, &c. Mensch, Manuel Pratique du Consul, p. 4. See, also, for the jurisdiction of consuls in the Levant, China, and Muscat, Moreuil, Manuel des Agents Consulaires, pp. 127, 377.

This subject was further elucidated during the controversy in reference to Koszta. Vide supra, p. 136, note.

The treaty of the United States with the Sultan of Muscat, 1833, article 9, authorizes the appointment of consuls in the ports of the Sultan where the principal commerce is carried on, and which consuls shall be the exclusive judges of all disputes or suits wherein American citizens shall be engaged with each other. U. S. Statutes at Large, vol. viii. p. 459. The treaty with Siam, 1833, article 10, stipulates for the privilege of appointing American consuls, provided it is accorded to any other power except the Portuguese. Id. p. 455. The Treaty of 31st March, 1854, with Japan, contains the following provision: — Article 11. There shall be appointed by the government of the United States consuls or agents, to reside in Simoda, at any time after the expiration of eighteen months from the date of the signing of this treaty, provided that either of the two governments deem such arrangement necessary. Washington Union.

[1] Vide supra, § 9, p. 144.

[2] Ibid. § 6, p. 121.

[3] Ibid. §§ 9, 10, pp. 145, 159.

[4] Vide infra, § 15.

municipal laws, committed within the territory of another State, unless by its own citizens; nor can it arrest the persons or property of the supposed offender within that territory; but it may arrest its own citizens in a place which is not within the jurisdiction of any other nation, as the high seas, and punish them for offences committed within such a place, or within the territory of a foreign State.

By the Common Law of England, which has been adopted, in this respect, in the United States, criminal offences are considered as altogether local, and are justiciable only by the courts of that country where the offence is committed. But this principle is peculiar to the jurisprudence of Great Britain and the United States; and even in these two countries it has been frequently disregarded by the positive legislation of each, in the enactment of statutes, under which offences committed by a subject or citizen, within the territorial limits of a foreign State, have been made punishable in the courts of that country to which the party owes allegiance, and whose laws he is bound to obey. There is some contrariety in the opinions of different public jurists on this question; but the preponderance of their authority is greatly in favor of the jurisdiction of the courts of the offender's country, in such a case, wherever such jurisdiction is expressly conferred upon those courts, by the local laws of that country. This doctrine is also fully confirmed by the international usage and constant legislation of the different States of the European continent, by which crimes in general, or certain specified offences against the municipal code, committed by a citizen or subject in a foreign country, are made punishable in the courts of his own.[1]

Laws of trade and navigation cannot affect foreigners, beyond the territorial limits of the State, but they are binding upon its citizens, wherever they may be. Thus, offences against the laws of a State, prohibiting or regulating any particular traffic, may be punished by its tribunals, when committed by its citizens, in whatever place; but if committed by foreigners, such offences can only be thus punished when committed within the territory of the State, or on board of its

Laws of trade and navigation.

[1] Fœlix, Droit International Privé, §§ 510–532. See American Jurist, vol. xxii. p. 381–386.

vessels, in some place not within the jurisdiction of any other State.

Extradition of criminals.

The public jurists are divided upon the question, how far a sovereign State is obliged to deliver up persons, whether its own subjects or foreigners, charged with or convicted of crimes committed in another country, upon the demand of a foreign State, or of its officers of justice. Some of these writers maintain the doctrine, that, according to the law and usage of nations, every sovereign State is obliged to refuse an asylum to individuals accused of crimes affecting the general peace and security of society, and whose extradition is demanded by the government of that country within whose jurisdiction the crime has been committed. Such is the opinion of Grotius, Heineccius, Burlamaqui, Vattel, Rutherforth, Schmelzing, and Kent.[1] According to Puffendorf, Voet, Martens, Klüber, Leyser, Kluit, Saalfeld, Schmaltz, Mittermeyer, and Heffter, on the other hand, the extradition of fugitives from justice is a matter of imperfect obligation only; and though it may be habitually practised by certain States, as the result of mutual comity and convenience, requires to be confirmed and regulated by special compact, in order to give it the force of an international law.[2] And the last-mentioned learned writer considers the very fact of the existence of so many special treaties respecting this matter as conclusive evidence that there is no such general usage among nations, constituting a perfect obligation, and having the force of law properly so called. Even under systems of confederated States, such as the Germanic Confederation and the North American Union, this obligation is limited to the cases and conditions mentioned in the federal compacts.[3]

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[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. xi. §§ 3–5. Heineccius, Prælect. in Grot. j. t. Burlamaqui, tome ii. Part IV. ch. 3, §§ 23–29. Vattel, liv. ii. ch. 6, §§ 76, 77. Rutherforth, Inst. of Nat. Law, vol. ii. ch. 9, p. 12. Schmelzing, Systematischer Grundriss des praktischen Europäischen Völkerrechts, § 161. Kent's Comm. vol. i. pp. 36, 37, 5th ed.

[2] Puffendorf, Elementa, lib. viii. cap. 3. §§ 23, 24. Voet, de Stat. § 11, cap. 1, No. 6. Martens, Droit des Gens, liv. iii. ch. 3, § 101. Klüber, Droit des Gens, Part. II. tit. 1, ch. 2, § 66. Leyser, Meditationes ad Pandect. Med. 10. Kluit, de Deditione Profugorum, § 1, p. 7. Saalfeld, Handbuch des positiven Völkerrechts, § 40. Schmaltz, Europäisches Völkerrecht, p. 160. Mittermeyer, das deutsche Strafverfahren, Theil i. § 59, pp. 314–319.

[3] Mittermeyer, Ibid.

The negative doctrine, that, independent of special compact, no State is bound to deliver up fugitives from justice upon the demand of a foreign State, was maintained at an early period by the United States government, and is confirmed by a considerable preponderance of judicial authority in the American courts of justice, both State and Federal.[1]

The Constitution of the United States provides, (art. 4, s. 2,) that "a person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime."

By the 10th article of the treaty concluded at Washington on the 9th August, 1842, between the United States and Great Britain, it was "agreed that the United States and her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons, who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: Provided, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had been there committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, — to the end that the evidence of criminality may be heard and

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[1] See Mr. Jefferson's Letter to M. Genet, Sept. 12, 1793. The decision of Mr. Chancellor Kent, *in re* Washburn, Johnson's Ch. Rep. vol. iv. p. 166, is counterbalanced in that of Chief Justice Tilghman, in Respublica *v.* Deacon, Sergeant & Rawle's Rep. vol. x. p. 125; by that of Mr. Chief Justice Parker, in Respublica *v.* Green, Massachusetts Rep. vol. xvii. pp. 515-548; and by the judgment of the Supreme Court of the United States, in Holmes *v.* Jennison, Peters's Rep. vol. xiv. p. 540.

considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitives. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition and receives the fugitive."

By the convention concluded at Washington on the 9th November, 1843, between the United States and France, it was agreed:

"Art. 1. That the high contracting parties shall, on requisitions made in their name, through the medium of their respective diplomatic agents, deliver up to justice persons who, being accused of the crimes enumerated in the next following article, committed within the jurisdiction of the requiring party, shall seek an asylum or shall be found within the territories of the other: Provided, That this shall be done only when the fact of the commission of the crime shall be so established, as that the laws of the country, in which the fugitive or the person so accused shall be found, would justify his or her apprehension and commitment for trial, if the crime had been there committed.

"Art. 2. Persons shall be so delivered up who shall be charged, according to the provisions of this convention, with any of the following crimes, to wit: murder, (comprehending the crimes designated in the French penal code by the terms assassination, parricide, infanticide, and poisoning,) or with an attempt to commit murder, or with rape, or with forgery, or with arson, or with embezzlement by public officers, when the same is punishable with infamous punishment.

"Art. 3. On the part of the French government the surrender shall be made only by authority of the Keeper of the Seals, Minister of Justice; and on the part of the Government of the United States, the surrender shall be made only by the authority of the Executive thereof.

"Art. 4. The expenses of any detention and delivery, effected in virtue of the preceding provisions, shall be borne and defrayed by the government in whose name the requisition shall have been made.

"Art. 5. The provisions of the present convention shall not

be applied in any manner to the crimes enumerated in the second article, committed anterior to the date thereof, nor to any crime or offence of a purely political character."

The following additional article to the above convention was concluded between the contracting parties at Washington on the 24th February, 1845, and subsequently ratified.

" The crime of robbery, defining the same to be the felonious and forcible taking from the person of another, of goods or money, to any value, by violence or putting him in fear; and the crime of burglary, defining the same to be, breaking and entering by night into a mansion-house of another, with intent to commit felony; and the corresponding crimes included under the French law in the words *vol qualifié crime*, not being embraced in the second article of the convention of extradition concluded between the United States and France on the 9th of November, 1843, it is agreed by the present article, between the high contracting parties, that persons charged with those crimes shall be respectively delivered up, in conformity with the first article of the said convention; and the present article, when ratified by the parties, shall constitute a part of the said convention, and shall have the same force as if it had been originally inserted in the same."

In the negotiation of treaties, stipulating for the extradition of persons accused or convicted of specified crimes, certain rules are generally followed, and especially by constitutional governments. The principle of these rules are, that a State should never authorize the extradition of its own citizens or subjects, or of persons accused or convicted of political or purely local crimes, or of slight offences, but should confine the provision to such acts as are, by common accord, regarded as grave crimes.[1] (*a*)

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[1] Ortolan, Régles Internationales de la Mer, t. i. p. 340.

(*a*) [The treaty of extradition between Great Britain and France, of February 18, 1843, applies to murder, defining it as in the treaty of the latter with the United States, — to an attempt to commit murder, forgery, and fraudulent bankruptcy. Annual Register, 1843, p. 470. *Fraudulent bankruptcy* excepted from the treaties of extradition, made by the United States, is included generally among the crimes provided for in the conventions between European powers. As to political refugees, England has never permitted them to be embraced in such treaties, nor is their expulsion, at the demand of their own governments, within the policy of her alien acts. Lord Palmerston declared, that " any such demand would be met with a firm and decided refusal. It is,"

The delivering up by one State of deserters from the military or naval service of another also depends entirely upon mutual comity, or upon special compact between different nations.[1] (*a*)

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said he, "obvious that it must be so, because no such measure could be taken by the government of this country, without fresh powers by act of Parliament, and no government could apply for such a power with any chance of success, inasmuch as no alien bill, I believe, either in former periods or in the course of this century, has been passed, ever giving to the government the power of expelling foreigners, except with reference to considerations connected with the internal safety of this country. The British government has never undertaken to provide for the internal safety of other countries. It is sufficient for them to have the power to provide for the internal safety of their own." Hansard's Parliamentary Debates, vol. 124, p. 805.

Treaties of extradition do not apply to political offences; but in 1849 a demand was made by Russia and Austria on Turkey for the delivery up of the Poles and Hungarians, who had escaped into the Sultan's dominions, and on his refusal Russia and Austria suspended all diplomatic intercourse with the Porte, but ultimately the two emperors receded from their demands. Annual Reg. 1849. p. 342. The grounds of these pretensions are referred to, and the treaty of Kutschouc-Kaynardgi of 1774, with Russia, and of Belgrade, between the Porte and Austria, examined, in the discussions connected with the affair of Martin Koszta. See Cong. Doc. H. of R. 33d Cong. 1 Sess. Ex. Doc. 91, p. 34, 45.]

[1] Bynkershoek Quæst. Jur. Pub. lib. i. cap. 22. Note to Duponceau's Transl. p. 174.

(*a*) [Since the publication of this treatise, the treaty of 20th December, 1849, has been concluded between the United States and the King of the Hawaiian islands, the 14th article of which contains the same provisions as the treaty with England, 1842, in relation to the extradition of criminals, (U. S Stat. at Large, vol. ix. p. 981.) A treaty of this kind was also made in 1852, at Washington, between the United States and Prussia, acting in her own behalf, and in behalf of several of the German States, viz., Saxony, Electoral Hesse, Ducal Hesse, Saxe-Weimar-Eisenach, Saxe-Meiningen, Saxe-Altenburg, Saxe-Coburg-Gotha, Brunswick, Anhalt-Dessau, Anhalt-Bernburg, Nassau, Schwarzburg-Sondershausen, Schwarzburg-Rudolstadt, Waldeck, Reuss, elder and junior branch, Lippe, Hesse-Homburg, and the free city of Frankfort. Differing from the extradition treaties which the United States had made with England and France, it provides that none of the contracting parties shall be bound to deliver up its own citizens or subjects under the stipulations of this convention. For this provision it recites as a reason, "that whereas the laws and constitution of Prussia and of the other German States, parties to this convention, forbid them to surrender their own citizens to a foreign jurisdiction, the government of the United States, with a view of making the convention strictly reciprocal, shall be held equally free from any obligation to surrender citizens of the United States." When a person accused of any of the offences enumerated in the treaty, shall have committed a new crime in the territory, where he has sought an asylum, he shall not be

§ 14. Extraterritorial operation of a criminal sentence.

A criminal sentence pronounced under the municipal law in one State can have no direct legal effect in another. If it is a sentence of conviction, it cannot be executed without the limits of the State in which it is

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delivered till he has been tried and punished or acquitted. There is, also, a provision that the stipulations of the convention shall be applied to any other State of the Germanic Confederation, which may thereafter declare its accession thereto. The crimes enumerated in the convention, and on account of which fugitives are to be delivered up on mutual requisitions, by their governments, or their ministers, officers, or authorities, respectively made, are murder, assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged papers, or the fabrication or circulation of counterfeit money, whether coin or paper money, or the embezzlement of public moneys, committed within the jurisdiction of either party. Treaties of the United States, 1854, p. 98.

An act of Congress for giving effect to these treaty stipulations with foreign governments was approved on the 12th of August, 1848. It vests the judges of the Supreme Court of the United States, the district judges, and the commissioners appointed for the purpose by any of the United States courts, and also the judges of the several State courts, upon complaint made on oath or affirmation, with power to arrest persons charged with offences falling within the provisions of any of the treaty stipulations; and if, on hearing the testimony, it be deemed sufficient to sustain the charge under the provisions of the treaty, it shall be the duty of the judge or commissioner to certify the same to the Secretary of State with all the testimony taken before him, that a warrant may issue on the requisition of the proper authorities of the foreign government, and the judge or commissioner shall issue his warrant for the commitment of the person charged to a proper jail till the surrender is made. The Secretary of State is authorized, under his hand and seal of office, to order such offenders to be delivered to such persons as the foreign government may authorize to receive them. U. S. Stat. at Large. vol. ix. p. 302. In a case under the British treaty the question came before the Supreme Court of the United States, whether a judge or commissioner could proceed without the previous authorization of his own government, and whether the agents of a foreign government have a right to call on our judicial officers to act, in advance of authority from the President. There was a diversity of views on this point among the members of the court, though a majority were, on other grounds, against entertaining an appeal from the decision of the commissioner, or granting an original writ of *habeas corpus*. By the judges, who sustained the action of the commissioner, independently of any initiatory proceeding on the part of the Executive, it was maintained:

"That an executive order of surrender to a foreign government is purely a national act, is not open to controversy; nor can it be doubted that the executive act must be performed through the Secretary of State by order of our Chief Magistrate, representing this nation. But it does not follow that Congress is excluded from vesting authority in judicial magistrates to arrest and commit, preparatory to a surrender.

pronounced, upon the person or property of the offender; and if he is convicted of an infamous crime, attended with civil dis-

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"The treaty with Great Britain is equally binding on us as the act of Congress, and it likewise confers jurisdiction and authority on the judges and magistrates of the respective governments, to issue warrants for the apprehension of fugitives, and for hearing and considering the evidence produced against them; and also provides, that the committing magistrate shall certify as to the sufficiency of the evidence, to the executive authority, so that a warrant of surrender may issue. Congress was scrupulously careful, neither to limit or extend the treaty stipulations. According to the terms of the statute no doubt is entertained that the judicial magistrates of the United States, designated by the act, are required to issue warrants and cause arrests to be made, at the instance of the foreign government, on proof of criminality, as in ordinary cases when crimes are committed within our own jurisdiction, and are punishable by the laws of the United States."

On the other hand, it was said:

"No demand was made upon this government, by the government of Great Britain claiming the surrender. This government was passed by, and the requisition made by the consul, directly upon the magistrate, on the ground, as contended for, namely, that the consent or authority of the Executive is unnecessary to warrant the institution of the proceedings; and, in support of their propriety and regularity, the position is broadly taken, and without which the proceedings cannot be upheld, that according to the true interpretation of the treaty, any officer of Great Britain, however inferior, properly represents the sovereign of that country, who may choose to prosecute the alleged fugitive in making the requisition, and is entitled to the obedience of the judicial tribunals for that purpose, and if sufficient evidence is produced before them to arrest and commit, that a surrender may be made; and that in this respect, such officer is put on the footing of any of the prosecuting officers of this government, who are authorized to institute criminal proceedings for a violation of its laws; that the country is open to him, throughout the limits of the Union, and the judicial tribunals bound to obedience on his requisition and proofs, to make the arrest and commitment. This is the argument. Now, upon recurring to the terms of the treaty, it will be seen, that no such stipulations were entered into, or intended to be entered into, by either government, or any authority conferred to justify such a proceeding. The two nations agree that upon 'mutual requisition by them, or their officers or authorities respectively made,' — that is on a requisition made by the one government, or by its ministers or officers properly authorized upon the other — the government, upon whom the demand is thus made, shall deliver up to justice all persons charged with the crimes, as provided in the treaty, who shall have sought an asylum within her territories. In other words, on a demand, made by the authority of Great Britain upon this government, it shall deliver up the fugitive; and so in respect to a demand by the authority of this government upon her. This is the exact stipulation entered into when plainly interpreted. It is a compact between the two nations in respect to a matter of national concern —

qualifications in his own country, such a sentence can have no legal effect in another independent State.[1]

But a valid sentence, whether of conviction or acquittal, pro-

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the punishment of criminal offenders against their laws — and where the guilty party could be tried and punished only within the jurisdiction whose laws have been violated. The duty or obligation entered into, is the duty or obligation of the respective nations, and each is bound to see that it is fulfilled, and each is responsible to the other in case of a violation. When the *casus fœderis* occurs, the requisition or demand must be made by the one nation upon the other. And under our system of government, a demand upon the nation must be made upon the President, who has charge of all its foreign relations, and with whom only foreign governments are authorized or even permitted to hold any communication of a national concern. He alone is authorized by the Constitution to negotiate with foreign governments, and enter into treaty obligations binding on the nation; and, in respect to all questions arising out of these obligations, or relating to our foreign relations, in which other governments are interested, application must be made to him. A requisition or demand, therefore, upon this government must, under any treaty stipulation, be made upon the Executive, and cannot be made through any other department, or in any other way." Howard's Reports, vol. xiv. p. 103. In Re Kane.

The general result of this case is, that under the British treaty the proceeding may either commence with a mandate from the President or by a warrant direct from the officer authorized to enforce it. Foreign governments may apply to ours, in the first instance. That course, under the decision of the Supreme Court, is the safest, though it may not be a necessary one; but in either event the subsequent proceedings are under the direction of the examining magistrate, and cannot be controlled by the President. See opinion of Attorney-General, (Mr. Cushing,) August 31, 1853. Washington Union. It had been previously decided that the Supreme Court had no jurisdiction to issue a *habeas corpus* for the purpose of reversing a decision under the treaty of 1843, with France. Howard's Rep. vol. v. p. 176. In the Matter of Metzger. In England the requisition must always be made through the Executive government, and in treaties of this description the preliminary action of the legislature is there necessary. At the time of the signature of the treaty of 1842, the British Minister stated that the rendition treaty could have no effect in the British dominions in Europe till Parliament acted on it. In Canada it could have an immediate effect. Lord Ashburton to Mr. Webster, August 9, 1842. An act of Parliament, 6 & 7 Vict. c. 76, passed July, 1843, empowers one of the principal Secretaries of State, or the Secretary for Ireland, to issue his warrant, signifying that a requisition had been made, in pursuance of this treaty, and requiring all justices, &c., to aid in apprehending the person charged with the crime, and the same functionaries are the officers to order the delivery of the party to the persons authorized to receive them.]

[1] Martens, Précis, &c., liv. iii. ch. 3, § 86. Klüber, Droit des Gens moderne de l'Europe, pt. ii. tit. 1, ch. 2, §§ 64, 65. Fœlix, Droit International Privé, § 565.

nounced in one State, may have certain indirect and collateral effects in other States. If pronounced under the municipal law in the State where the supposed crime was committed, or to which the supposed offender owed allegiance, the sentence, either of conviction or acquittal, would, of course, be an effectual bar (*exceptio rei judicatæ*) to a prosecution in any other State. If pronounced in any other foreign State than that where the offence is alleged to have been committed, or to which the party owed allegiance, the sentence would be a nullity, and of no avail to protect him against a prosecution in any other State having jurisdiction of the offence.

§ 15. Piracy under the law of nations.

The judicial power of every State extends to the punishment of certain offences against the law of nations, among which is piracy.

Piracy is defined by the text writers to be the offence of depredating on the seas, without being authorized by any sovereign State, or with commissions from different sovereigns at war with each other.[1]

The officers and crew of an armed vessel, commissioned against one nation, and depredating upon another, are not liable to be treated as pirates in thus exceeding their authority. The State by whom the commission is granted, being responsible to other nations for what is done by its commissioned cruisers, has the exclusive jurisdiction to try and punish all offences committed under color of its authority.[2]

The offence of depredating under commissions from different sovereigns, at war with each other, is clearly piratical, since the authority conferred by one is repugnant to the other; but it has been doubted how far it may be lawful to cruise under commissions from different sovereigns allied against a common enemy. The better opinion, however, seems to be, that although it might not amount to the crime of piracy, still it would be irregular and illegal, because the two co-belligerents may have adopted dif-

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[1] See authorities cited in Note to the case of United States *v.* Smith, Wheaton's Rep. vol. v. 157.

[2] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 17. Rutherforth's Ins. vol. ii. p. 595.

ferent rules of conduct respecting neutrals, or may be separately bound by engagements unknown to the party.[1]

Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high seas by the armed vessels of any particular State, and brought within its territorial jurisdiction, for trial in its tribunals.[2]

Distinction between piracy by the law of nations, and piracy under the municipal statutes.

This proposition, however, must be confined to piracy as defined by the law of nations, and cannot be extended to offences which are made piracy by municipal legislation. Piracy, under the law of nations, may be tried and punished in the courts of justice of any nation, by whomsoever and wheresoever committed; but piracy created by municipal statute can only be tried by that State within whose territorial jurisdiction, and on board of whose vessels, the offence thus created was committed. There are certain acts which are considered piracy by the internal laws of a State, to which the law of nations does not attach the same signification. It is not by force of the international law that those who commit these acts are tried and punished, but in consequence of special laws which assimilate them to pirates, and which can only be applied by the State which has enacted them, and then with reference to its own subjects, and in places within its own jurisdiction. The crimes of murder and robbery, committed by foreigners on board of a foreign vessel, on the high seas, are not justiciable in the tribunals of another country than that to which the vessel belongs; but if committed on board of a vessel not at the time belonging, in fact as well as right, to any foreign power or its subjects, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no flag whatsoever, these crimes may be punished as piracy under

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[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 17, p. 130, Duponceau's Transl. Valin Commentaire sur l'Ord. de la Marine, tom. ii. p. 236. "The law," says Sir L. Jenkins, "distinguishes between a pirate who is a highwayman, and sets up for robbing, either having no commission at all or else hath two or three, and a lawful man-of-war that exceeds his commission." Works, vol. ii. p. 714.

[2] "Every man, by the usage of our European nations, is *justiciable* in the place where the crime is committed; so are pirates, being reputed out of the protection of all laws and privileges, and to be tried in what ports soever they may be taken." Sir L. Jenkins's Works, ib.

the law of nations, in the courts of any nation having custody of the offenders.[1]

Slave trade, whether prohibited by the law of nations.

The African slave trade, though prohibited by the municipal laws of most nations, and declared to be piracy by the statutes of Great Britain and the United States, and, since the Treaty of 1841, with Great Britain, by Austria, Prussia, and Russia, is not such by the general international law, and its interdiction cannot be enforced by the exercise of the ordinary right of visitation and search. That right does not exist, in time of peace, independently of special compact.[2]

The African slave trade, once considered not only a lawful but desirable branch of commerce, a participation in which was made the object of wars, negotiations, and treaties between different European States, is now denounced as an odious crime, by the almost universal consent of nations. This branch of commerce was, in the first instance, successively prohibited by the municipal laws of Denmark, the United States, and Great Britain, to their own subjects. Its final abolition was stipulated by the treaties of Paris, Kiel, and Ghent, in 1814, confirmed by the declaration of the Congress of Vienna, of the 8th of February, 1815, and reiterated by the additional article annexed to the treaty of peace concluded at Paris, on the 20th November, 1815. The accession of Spain and Portugal to the principle of the abolition was finally obtained, by the treaties between Great Britain and those powers, of the 23d September, 1817, and the 22d January, 1815. And by a convention concluded with Brazil, in 1826, it was made piratical for the subjects of that country to be engaged in the trade after the year 1830.

By the treaties of the 30th November, 1831, and 22d May, 1833, between France and Great Britain, to which nearly all the maritime powers of Europe have subsequently acceded, the mutual right of search was conceded, within certain geographical limits, as a means of suppressing the slave trade. The pro-

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1 Wheaton's Rep. vol. v. pp. 144, 184. United States *v.* Klintock; United States *v.* Pirates.

2 Dodson's Adm. Rep. vol. ii. p. 210. Le Louis. Wheaton's Rep. vol. x. p. 66. La Jeune Eugenie. [The Treaty of 1817, with Spain, was the first one in which the reciprocal right of search was granted.]

visions of these treaties were extended to a wider range by the Quintuple Treaty, concluded on the 26th December, 1841, between the five great European powers, and subsequently ratified between them, except by France, which power still remained only bound by her treaties of 1831 and 1833 with Great Britain. By the treaty concluded at Washington, the 9th August, 1842, between the United States and Great Britain, referring to the 10th article of the Treaty of Ghent, by which it had been agreed that both the contracting parties should use their best endeavors to promote the entire abolition of the traffic in slaves, it was provided, article 8, that "the parties mutually stipulate that each shall prepare, equip, and maintain in service, on the coast of Africa, a sufficient and adequate squadron, or naval force of vessels, of suitable numbers and descriptions, to carry in all not less than eighty guns, to enforce, separately and respectively, the laws, rights, and obligations of each of the two countries, for the suppression of the slave trade, the said squadrons to be independent of each other, but the two governments stipulating, nevertheless, to give such orders to the officers commanding their respective forces, as shall enable them most effectually to act in concert and coöperation, upon mutual consultation, as exigencies may arise, for the attainment of the true object of this article; copies of all such orders to be communicated by each government to the other, respectively." By the Treaty of the 29th May, 1845, between France and Great Britain, new stipulations were entered into between the two powers, by which a joint coöperation of their naval forces on the coast of Africa, for the suppression of the slave trade, was substituted for the mutual right of search, provided by the previous treaties of 1831 and 1833. (*a*)

(*a*) [Ortolan distinguishes the right of ships of war to ascertain the nationality of a merchantman, *droit d'enquête du pavillon*, from the right of visitation or search, *droit de visite ou de recherche*. Signals, exchange of words, suffice with respect to the nationality of the flag, except on suspicion of piracy, when all further proceedings must be taken at the risk of the man-of-war. He unites with the American publicist, Mr. Wheaton, in declaring that the right of visitation or search does not exist except in time of war, and he then confines the right to ascertaining the nationality of the ship and whether there be any contraband articles on board. The right of visit or search being accorded by special conventions, between different States, does not make it a part of the Law of Nations. The

Decisions of British and American courts of justice.

This general concert of nations to extinguish the traffic has given rise to the opinion, that though once tolerated, and even protected and encouraged, by the laws of every maritime country, it ought henceforth to be considered as interdicted by the international code of Europe and

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Conventions of 1831 and 1833, made by France with England, for the suppression of the slave trade, as well as the Quintuple Treaty of 1841, are all in derogation of natural right. Every nation has a right to exercise an exclusive police, at sea, over its own vessels. Diplomatie de la Mer, p. 242.

Hautefeuille says that *la visite* is not a right, but the exercise of the belligerent claim of injuring the enemy, which cannot exist in time of peace except as a violation of the independence of nations. In war, it only exists to ascertain whether the vessel belongs to an enemy; or, if not an enemy's vessel, whether it has contraband on board destined for an enemy's port. Those nations which regard enemy's property on board of neutral vessels as liable to confiscation, a pretension which he denies, extend it to the verification of the cargo. Several treaties among European nations, for the suppression of the slave trade, have admitted the reciprocal right of visitation in time of peace; and some of them have extended it to the right of search, which no formal treaty had acknowledged, even in time of war. The right of visit, he defines to be the power granted to a foreign ship of war, to stop a vessel and to go on board of her, and verify, by her papers, if she belongs really to the nation whose flag she bears. This right, Hautefeuille conceives still to be conceded by the Treaty of 29th May, 1845, between France and England, concluded to replace those of 1831 and 1833 and especially the Quintuple Treaty of 1841, which France refused to ratify. The construction objected to has, it is believed, been obviated by the instructions given to the British commanders, not to capture, visit, or detain French vessels. Droits des Nations Neutres, t. iii. p. 431. Public Documents.

See, further, on the subject of a right of visitation and search, in time of peace, "An Inquiry into the validity of the British Claim to a Right of Visitation and Search, of American Vessels suspected to be engaged in the African Slave Trade," by Mr. Wheaton: London, 1842; and "Examen de la Question aujourd'hui pendante entre le Gouvernement des États Unis et celui de la Grande Bretagne, concernant le Droit de Visite," (ascribed to Hon. Lewis Cass, then Minister to France,) Paris, 1842. These Essays, with the Letter of General Cass to M. Guizot, dated 13th February, 1842, and which was in the nature of a protest against the Quintuple Treaty of 20th December, 1841, are understood to have had no little influence in preventing the ratification of that treaty by the government of France. The provisions respecting the slave trade in the Treaty of Washington, of 1842, were intended to waive the questions, as to which a serious controversy had existed between the United States and Great Britain, in consequence of the latter claiming a right of detaining vessels, suspected to be engaged in the slave trade, for the purpose of ascertaining their nationality. See, with reference to that treaty and the discussions to which it gave rise, Webster's Works, vol. v. p. 142; vol. vi. p. 329.]

America. This opinion first received judicial countenance from the judgment of the Lords of Appeal in Prize Causes, pronounced in the case of an American vessel, The Amadie, in 1807, the trade having been previously abolished by the municipal laws of the United States and of Great Britain. The judgment of the Court was delivered by Sir William Grant, in the following terms:

"This ship must be considered as being employed, at the time of capture, in carrying slaves from the coast of Africa to a Spanish colony. We think that this was evidently the original plan and purpose of the voyage, notwithstanding the pretence set up to veil the true intention. The claimant, however, who is an American, complains of the capture, and demands from us the restitution of property, of which, he alleges, that he has been unjustly dispossessed. In all the former cases of this kind which have come before this Court, the slave trade was liable to considerations very different from those which belong to it now. It had, at that time, been prohibited (so far as respected carrying slaves to the colonies of foreign nations) by America, but by our own laws it was still allowed. It appeared to us, therefore, difficult to consider the prohibitory law of America in any other light than as one of those municipal regulations of a foreign State of which this Court could not take any cognizance. But by the alteration which has since taken place, the question stands on different grounds, and is open to the application of very different principles. The slave trade has since been totally abolished by this country, and our legislature has pronounced it to be contrary to the principles of justice and humanity. Whatever we might think, as individuals, before, we could not, sitting as judges in a British court of justice, regard the trade in that light while our own laws permitted it. But we can now assert that this trade cannot, abstractedly speaking, have a legitimate existence.

"When I say *abstractedly speaking*, I mean that this country has no right to control any foreign legislature that may think fit to dissent from this doctrine, and to permit to its own subjects the prosecution of this trade; but we have now a right to affirm that *primâ facie* the trade is illegal, and thus to throw on claimants the burden of proof, that, in respect of them, by the authority of their own laws, it is otherwise. As the case now stands,

we think we are entitled to say that a claimant can have no right, upon principles of universal law, to claim the restitution in a Prize Court of human beings carried as slaves. He must show some right that has been violated by the capture, some property of which he has been dispossessed, to which he ought to be restored. In this case, the laws of the claimant's country allow of no property such as he claims. There can, therefore, be no right to restitution. The consequence is, that the judgment must be affirmed."[1]

In the case of The Fortuna, determined in 1811, in the High Court of Admiralty, Lord Stowell, in delivering the judgment of the Court, stated that an American ship, *quasi* American, was entitled, upon proof, to immediate restitution; but she might forfeit, as other neutral ships might, that title, by various acts of misconduct, by violations of belligerent rights most clearly and universally recognized. But though the Prize Court looked primarily to violations of belligerent rights as grounds of confiscation in vessels not actually belonging to the enemy, it had extended itself a good deal beyond considerations of that description only. It had been established by recent decisions of the Supreme Court, that the Court of Prize, though properly a court purely of the law of nations, has a right to notice the municipal law of this country *in the case of a British vessel* which, in the course of a prize-proceeding, appears to have been trading in violation of that law, and to reject a claim for her on that account. That principle had been incorporated into the prize-law of this country within the last twenty years, and seemed now fully incorporated. A late decision in the case of The Amadie seemed to have gone the length of establishing a principle, that any trade contrary to the general law of nations, although not tending to, or accompanied with, any infraction of the law of that country whose tribunals were called upon to consider it, might subject the vessels employed in that trade to confiscation. The Amadie was an American ship, employed in carrying on the slave trade; a trade which this country, *since its own abandonment of it*, had deemed repugnant to the law of nations, to justice, and humanity; though without presuming so to consider and

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[1] Acton's Admiralty Reports, vol. p. 240.

treat it where it occurs in the practice of the subjects of a State which continued to tolerate and protect it by its own municipal regulations; but it put upon the parties the burden of showing that it was so tolerated and protected, and in failure of producing such proof, proceeded to condemnation, as it did in the case of that vessel. "How far that judgment has been universally concurred in and approved," continued Lord Stowell, "is not for me to inquire. *If there be those who disapprove of it, I certainly am not at liberty to include myself in that number, because the decisions of that court bind authoritatively the conscience of this;* its decisions must be conformed to, *and its principles practically adopted.* The principle laid down in that case appears to be, that the slave trade, carried on by a vessel belonging to a subject of the United States, is a trade which, being unprotected by the domestic regulations of their legislature and government, subjects the vessel engaged in it to a sentence of condemnation. If the ship should therefore turn out to be an American, actually so employed — it matters not, in my opinion, in what stage of the employment, whether in the inception, or the prosecution, or the consummation of it — the case of The Amadie will bind the conscience of this court to the effect of compelling it to pronounce a sentence of confiscation." [1]

In a subsequent case, that of The Diana, Lord Stowell limited the application of the doctrine invented by Sir W. Grant, to the special circumstances which distinguished the case of The Amadie. The Diana was a Swedish vessel, captured by a British cruiser on the coast of Africa whilst actually engaged in carrying slaves to the Swedish West India possessions. The vessel and cargo were restored to the Swedish owner, on the ground that Sweden had not then prohibited the trade by law or convention, and still continued to tolerate it in practice. It was stated by Lord Stowell, in delivering the judgment of the High Court of Admiralty in this case, that England had abolished the trade as unjust and criminal; but she claimed no right of enforcing that prohibition against the subjects of those States which had not adopted the same opinion; and England did not mean to set herself up as the legislator and *custos morum* for the whole world, or pre-

[1] Dodson's Admiralty Reports, vol. i. p. 81.

sume to interfere with the commercial regulations of other States. The principle of the case of The Amadie was, that where the municipal law of the country to which the parties belonged had prohibited the trade, British tribunals would hold it to be illegal upon general principles of justice and humanity ; but they would respect the property of persons engaged in it under the sanction of the laws of their own country.[1]

The above three cases arose during the continuance of the war, and whilst the laws and treaties prohibiting the slave-trade were incidentally executed through the exercise of the belligerent right of visitation and search.

In the case of The Diana, Lord Stowell had sought to distinguish the circumstances of that case from those of The Amadie, so as to raise a distinction between the case of the subjects of a country which had already prohibited the slave-trade, from that of those whose governments still continued to tolerate it. At last came the case of the French vessel called The Louis, captured after the general peace, by a British cruiser, and condemned in the inferior Court of Admiralty. Lord Stowell reversed the sentence in 1817, discarding altogether the authority of The Amadie as a precedent, both upon general reasoning, which went to shake that case to its very foundations, and upon the special ground, that even admitting that the trade had been actually prohibited by the municipal laws of France, (which was doubtful,) the right of visitation and search (being an exclusively belligerent right) could not consistently with the law of nations be exercised, in time of peace, to enforce that prohibition by the British courts upon the property of French subjects. In delivering the judgment of the High Court of Admiralty in this case, Lord Stowell held that the slave-trade, though unjust and condemned by the statute law of England was not piracy, nor was it a crime by the universal law of nations. A court of justice, in the administration of law, must look to the legal standard of morality — a standard which, upon a question of this nature, must be found in the law of nations as fixed, and evidenced by general, ancient, and admitted practice, by treaties, and by the general tenor of the laws, ordinances, and formal transactions of civilized States; and looking

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[1] Dodson's Admiralty Reports, vol. i. p. 95.

to these authorities, he found a difficulty in maintaining that the transaction was legally criminal. To make it piracy or a crime by the universal law of nations, it must have been so considered and treated in practice by all civilized States, or made so by virtue of a general convention.

The slave-trade, on the contrary, had been carried on by all nations, including Great Britain, until a very recent period, and was still carried on by Spain and Portugal, and not yet entirely prohibited by France. It was not, therefore, a criminal act by the consuetudinary law of nations; and every nation, independently of special compact, retained a legal right to carry it on. No nation could exercise the right of visitation and search upon the common and unappropriated parts of the ocean, except upon the belligerent claim. No one nation had a right to force its way to the liberation of Africa by trampling on the independence of other States; or to procure an eminent good by means that are unlawful; or to press forward to a great principle by breaking through other great principles that stand in the way. The right of visitation and search on the high seas did not exist in time of peace. If it belonged to one nation it equally belonged to all, and would lead to gigantic mischief and universal war. Other nations had refused to accede to the British proposal of a reciprocal right of search in the African seas, and it would require an express convention to give the right of search in time of peace.[1]

The leading principles of this judgment were confirmed in 1820 by the Court of King's Bench, in the case of Madrazo *v.* Willes, in which the point of the illegality of the slave-trade, under the general law of nations, came incidentally in question. The court held that the British statutes against the slave-trade were applicable to British subjects only. The British Parliament could not prevent the subjects of other States from carrying on the trade out of the limits of the British dominions. If a ship be acting contrary to the general law of nations, she is thereby subject to condemnation; but it was impossible to say that the slave-trade is contrary to the law of nations. It was, until lately, carried on by all the nations of Europe; and a practice so sanctioned could only be rendered illegal on the principles of inter-

[1] Dodson's Admiralty Reports, vol. ii. p. 210.

national law, by the consent of all the powers. Many States had so consented, but others had not; and the adjudged cases had gone no farther than to establish the rule, that ships belonging to countries that had prohibited the trade were liable to capture and condemnation, if found engaged in it.[1]

A similar course of reasoning was adopted by the Supreme Court of the United States in the case of Spanish and Portuguese vessels captured by American cruisers, whilst the trade was still tolerated by the laws of Spain and Portugal. It was stated by Mr. Chief Justice Marshall, in delivering the judgment of the Court, that it could hardly be denied that the slave-trade was contrary to the law of nature. That every man had a natural right to the fruits of his own labor, was generally admitted; and that no other person could rightfully deprive him of those fruits, and appropriate them against his will, seemed to be the necessary result of this admission. But, from the earliest times, war had existed, and war conferred rights in which all had acquiesced. Among the most enlightened nations of antiquity, one of these rights was, that the victor might enslave the vanquished. That which was the usage of all nations could not be pronounced repugnant to the law of nations, which was certainly to be tried by the test of general usage. That which had received the assent of all must be the law of all.

Slavery, then, had its origin in force; but as the world had agreed that it was a legitimate result of force, the state of things which was thus produced by general consent could not be pronounced unlawful.

Throughout Christendom this harsh rule had been exploded, and war was no longer considered as giving a right to enslave captives. But this triumph had not been universal. The parties to the modern law of nations do not propagate their principles by force; and Africa had not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves. The question then was, could those who had renounced this law be permitted to participate in its effects by purchasing the human beings who are its victims?

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[1] Barnwell's and Alderson's Reports, vol. iii. p. 353.

Whatever might be the answer of a moralist to this question, a jurist must search for its legal solution in those principles which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world, of which he considers himself a part, and to whose law the appeal is made. If we resort to this standard as the test of international law, the question must be considered as decided in favor of the legality of the trade. Both Europe and America embarked in it; and for nearly two centuries, it was carried on without opposition, and without censure. A jurist could not say that a practice thus supported was illegal, and that those engaged in it might be punished, either personally or by deprivation of property.

In this commerce, thus sanctioned by universal assent, every nation had an equal right to engage. No principle of general law was more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone. A right, then, which was vested in all by the consent of all, could be devested only by consent; and this trade, in which all had participated, must remain lawful to those who could not be induced to relinquish it. As no nation could prescribe a rule for others, no one could make a law of nations; and this traffic remained lawful to those whose governments had not forbidden it.

If it was consistent with the law of nations, it could not in itself be piracy. It could be made so only by statute; and the obligation of the statute could not transcend the legislative power of the State which might enact it.

If the trade was neither repugnant to the law of nations, nor piratical, it was almost superfluous to say in that court that the right of bringing in for adjudication, in time of peace, even where the vessel belonged to a nation which had prohibited the trade, could not exist. The courts of justice of no country executed the penal laws of another; and the course of policy of the American government on the subject of visitation and search, would decide any case against the captors in which that right had been exercised by an American cruiser, on the vessel of a foreign nation, not violating the municipal laws of the United States. It followed that a foreign vessel engaged in the African

slave-trade, captured on the high seas in time of peace, by an American cruiser, and brought in for adjudication, would be restored to the original owners.[1]

§ 16. Extent of the judicial power as to property within the territory.

II. The judicial power of every State extends to all civil proceedings, *in rem*, relating to real or personal property within the territory.

This follows, in respect to real property, as a necessary consequence of the rule relating to the application of the *lex loci rei sitæ*. As every thing relating to the tenure, title, and transfer of real property (*immobilia*) is regulated by the local law, so also the proceedings in courts of justice relating to that species of property, such as the rules of evidence and of prescription, the forms of action and pleadings, must necessarily be governed by the same law.[2]

§ 17. Distinction between the rule of decision and the rule of procedure as affecting cases *in rem*.

A similar rule applies to all civil proceedings *in rem*, respecting personal property (*mobilia*) within the territory, which must also be regulated by the local law, with this qualification, that foreign laws may furnish the rule of decision in cases where they apply, whilst the forms of process, and rules of evidence and prescription are still governed by the *lex fori*. Thus the *lex domicilii* forms the law in respect to a testament of personal property or succession *ab intestato*, if the will is made, or the party on whom the succession devolves resides, in a foreign country; whilst at the same time the *lex fori* of the State in whose tribunals the suit is pending determines the forms of process and the rules of evidence and prescription.

Succession to personal property *ab intestato*.

Though the distribution of the personal effects of an intestate is to be made according to the law of the place where the deceased was domiciled, it does not therefore follow that the distribution is in all cases to be made by the tribunals of that place to the exclusion of those of the country where the property is situate. Whether the tribunal of the State where the property lies is to decree distribution, or to remit the property abroad, is a matter of judicial discretion to be exercised

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[1] Wheaton's Rep. vol. x. p. 66. The Antelope.

[2] Vide suprà, § 3, p. 116.

according to the circumstances. It is the duty of every government to protect its own citizens in the recovery of their debts and other just claims; and in the case of a solvent estate it would be an unreasonable and useless comity to send the funds abroad, and the resident creditor after them. But if the estate be insolvent, it ought not to be sequestered for the exclusive benefit of the subjects of the State where it lies. In all civilized countries, foreigners in such a case, are entitled to prove their debts and share in the distribution.[1]

Foreign will, how carried into effect in another country.

Though the forms, in which a testament of personal property, made in a foreign country, is to be executed, are regulated by the local law, such a testament cannot be carried into effect in the State where the property lies, until, in the language of the law of England, *probate* has been obtained in the proper tribunal of such State, or, in the language of the civilians, it has been *homologated*, or registered, in such tribunal.[2]

So, also, a foreign executor, constituted such by the will of the testator, cannot exercise his authority in another State without taking out letters of administration in the proper local court. Nor can the administrator of a succession *ab intestato*, appointed *ex officio* under the laws of a foreign State, interfere with the personal property in another State belonging to the succession, without having his authority confirmed by the local tribunal.

§ 18. Conclusiveness of foreign sentences *in rem*.

The judgment or sentence of a foreign tribunal of competent jurisdiction proceeding *in rem*, such as the sentences of Prize Courts under the law of nations, or Admiralty and Exchequer, or other revenue courts, under the municipal law, are conclusive as to the proprietary interest in, and title to, the thing in question, wherever the same comes incidentally in controversy in another State.

Whatever doubts may exist as to the conclusiveness of foreign sentences in respect of facts collaterally involved in the judgment, the peace of the civilized world, and the general security

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[1] Kent's Comment. on American Law, 5th ed. vol. ii. pp. 431, 432, and the cases there cited.

[2] Wheaton's Rep. vol. xii. p. 169, Armstrong *v.* Lear. Code Civil, liv. iii. tit. 2, art. 1000.

and convenience of commerce, obviously require that full and complete effect should be given to such sentences, wherever the title to the specific property, which has been once determined in a competent tribunal, is again drawn in question in any other court or country.

Transfer of property under foreign bankrupt proceedings.

How far a bankruptcy declared under the laws of one country will affect the real and personal property of the bankrupt situate in another State, is a question of which the usage of nations, and the opinions of civilians, furnish no satisfactory solution. Even as between coördinate States, belonging to the same common empire, it has been doubted how far the assignment under the bankrupt laws of one country will operate a transfer of property in another. In respect to real property, which generally has some indelible characteristics impressed upon it by the local law, these difficulties are enhanced in those cases where the *lex loci rei sitæ* requires some formal act to be done by the bankrupt, or his attorney, specially constituted, in the place where the property lies, in order to consummate the transfer. In those countries where the theory of the English bankrupt system, that the assignment transfers all the property of the bankrupt, wherever situate, is admitted in practice, the local tribunals would probably be ancillary to the execution of the assignment by compelling the bankrupt, or his attorney, to execute such formal acts as are required by the local laws to complete the conveyance.[1]

The practice of the English Court of Chancery, in assuming jurisdiction incidentally of questions affecting the title to lands in the British colonies, in the exercise of its jurisdiction *in personam*, where the party resides in England, and thus compelling him, indirectly, to give effect to its decrees as to real property situate out of its local jurisdiction, seems very questionable on principle, unless where it is restrained to the case of a party who has fraudulently obtained an undue advantage over other creditors by judicial proceedings instituted without personal notice to the defendant.

But whatever effect may, in general, be attributed to the assignment in bankruptcy as to property situate in another State,

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[1] See Lord Eldon's Observations in Selkrig *v.* Davies, Rose's Cases in Bankruptcy, vol. ii. p. 311. Vesey's Rep. vol. ix. p. 77, Banfield *v.* Solomon.

it is evident that it cannot operate where one creditor has fairly obtained, by legal diligence, a specific lien and right of preference, under the laws of the country where the property is situate.[1] (*a*)

[1] Kent's Comment. on American Law, vol. ii. pp. 404–408, 5th ed.

(*a*) ["In this country there is some diversity of opinion among the State courts, whether a bankrupt law, in regard to personal property, has an extra-territorial operation. That it has such operation is a doctrine which seems to be well settled in England by numerous decisions.

"It is held in England, that an assignment of personal property under the bankrupt law of a foreign country passes all such property and debts owing in England; that an attachment of such property by an English creditor, with or without notice, after such an assignment, is invalid. And the doctrine is there established, that an assignment under the English bankrupt law transfers the personal effects of the bankrupt in foreign countries. But an attachment by a foreign creditor, not subject to British laws, under the local laws of a foreign country, is held valid. The principle on which this doctrine rests is, that the personal estate is held as situate in that country where the bankrupt has his domicile.

"A statutable conveyance of property cannot strictly operate beyond the local jurisdiction. Any effect which may be given to it beyond this does not depend upon international law, but the principle of comity; and national comity does not require any government to give effect to such assignment, when it shall impair the remedies or lessen the securities of its own citizens. And this is the prevailing doctrine in this country. A proceeding *in rem* against the property of a foreign bankrupt, under our local laws, may be maintained by creditors, notwithstanding the foreign assignment.

"But it is an admitted principle in all countries where the common law prevails, whatever views may be entertained with regard to personal property, that real estate can be conveyed only under the territorial law.

"This doctrine has been uniformly recognized by the courts of the United States, and by the courts of the respective States. The form of conveyance adopted by each State for the transfer of real property must be observed. This is a regulation which belongs to the local sovereignty.

"As, under the Constitution, Congress exercised an exclusive jurisdiction over the subject of bankruptcy; the same rule of procedure extended throughout the Union. But the act of Congress could have no extraterritorial effect. Texas was an independent republic at the time of the decree in bankruptcy, and consequently no claim under it, even as regards personal property in that republic, could be made, except on the ground of comity. And on our own principles this could not be done, to the injury of local creditors.

"It is believed that no sovereignty has at any time assumed the power, by legislation or otherwise, to regulate the distribution or conveyance of real estate in a foreign government. There is no pretence that this government, through the agency of a bankrupt law, could subject the real property in Texas, or in any other foreign government, to the payment of debts. This can only be done by the laws of the sovereignty where such property may be situated." Howard's Rep. vol. xi. p. 44, Oakley *v.* Bennett.]

§ 19. Extent of the judicial power over foreigners residing within the territory.

III. The judicial power of every State may be extended to all controversies respecting personal rights and contracts, or injuries to the person or property, when the party resides within the territory, wherever the cause of action may have originated.

This general principle is entirely independent of the rule of decision which is to govern the tribunal. The rule of decision may be the law of the country where the judge is sitting, or it may be the law of a foreign State in cases where it applies; but that does not affect the question of jurisdiction, which depends, or may be made to depend, exclusively upon the residence of the party.

Depends upon municipal regulations.

The operation of the general rule of international law, as to civil jurisdiction, extending to all persons who owe even a temporary allegiance to the State, may be limited by the positive institutions of any particular country. It is the duty, as well as the right, of every nation to administer justice to its own citizens; but there is no uniform and constant practice of nations, as to taking cognizance of controversies between foreigners. It may be assumed or declined, at the discretion of each State, guided by such motives as may influence its juridical policy. All real and possessory actions may be brought, and indeed must be brought, in the place where the property lies; but the law of England, and of other countries where the English common law forms the basis of the local jurisprudence, considers all personal actions, whether arising *ex delicto* or *ex contractu*, as transitory; and permits them to be brought in the domestic forum, whoever may be the parties, and wherever the cause of action may originate. This rule is supported by a legal fiction, which supposes the injury to have been inflicted, or the contract to have been made, within the local jurisdiction. In the countries which have modelled their municipal jurisprudence upon the Roman civil law, the maxim of that code, *actor sequitur forum rei*, is generally followed, and personal actions must therefore be brought in the tribunals of the place where the defendant has acquired a fixed domicile.

Law of England and America.

French law.

By the law of France, foreigners who have established their domicile in the country by special license (*autorisation*) of the king, are entitled to all civil rights, and, among

others, to that of suing in the local tribunals as French subjects. Under other circumstances, these tribunals have jurisdiction where foreigners are parties in the following cases only : —

1. Where the contract is made in France, or elsewhere, between foreigners and French subjects.

2. In commercial matters, on all contracts made in France, with whomsoever made, where the parties have elected a domicile, in which they are liable to be sued, either by the express terms of the contract, or by necessary implication resulting from its nature.

3. Where foreigners voluntarily submit their controversies to the decision of the French tribunals, by waiving a plea to the jurisdiction.

In all other cases, where foreigners not domiciled in France by special license of the king are concerned, the French tribunals decline jurisdiction, even when the contract is made in France.[1]

A late excellent writer on private international law considers this jurisprudence, which deprives a foreigner, not domiciled in France, of the faculty of bringing a suit in the French tribunals against another foreigner, as inconsistent with the European law of nations. The Roman law had recognized the principle, that all contracts the most usual among men arise from the law of nations, *ex jure gentium ;* in other words, these contracts are valid, whether made between foreigners, or between foreigners and citizens, or between citizens of the same State. This principle has been incorporated into the modern law of nations, which recognizes the right of foreigners to contract within the territorial limits of another State. This right necessarily draws after it the authority of the local tribunals to enforce the contracts thus made, whether the suit is brought by foreigners or by citizens.[2]

The practice which prevails in some countries, of proceeding against absent parties, who are not only foreigners, but have not

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[1] Code Civil, art. 13, 14, 15. Code de Commerce, art. 631. Discussions sur le Code Civil, tom. i. p. 48. Pothier, Procédure Civile, partie i. ch. 1, p. 2. Valin, sur l'Ord. de la Marine, tom. i. pp. 113, 253, 254. Pardessus, Droit Commercial, Pt. VI. tit. 7, ch. 1, § 1.

[2] Fœlix, Droit International Privé, §§ 122, 123.

acquired a domicile within the territory, by means of some formal public notice, like that of the *viis et modis* of the Roman civil law, without actual personal notice of the suit, cannot be reconciled with the principles of international justice. So far, indeed, as it merely affects the specific property of the absent debtor within the territory, attaching it for the benefit of a particular creditor, who is thus permitted to gain a preference by superior diligence, or for the general benefit of all the creditors who come in within a certain fixed period, and claim the benefit of a ratable distribution, such a practice may be tolerated; and in the administration of international bankrupt law it is frequently allowed to give a preference to the attaching creditor, against the law of what is termed the *locus concursûs creditorum*, which is the place of the debtor's domicile.

§ 20. Distinction between the rule of decision and rule of proceeding, in cases of contract.

Where the tribunal has jurisdiction, the rule of decision is the law applicable to the case, whether it be the municipal or a foreign code; but the rule of proceeding is generally determined by the *lex fori* of the place where the suit is pending. (*a*) But it is not always easy to distinguish the rule of decision from the rule of proceeding. It may, however, be stated in general, that whatever belongs to the obligation of the contract is regulated by the *lex domicilii*, or the *lex loci contractus*, and whatever belongs to the remedy for enforcing the contract is regulated by the *lex fori*.

If the tribunal is called upon to apply to the case the law of the country where it sits, as between persons domiciled in that country, no difficulty can possibly arise. As the obligation of the contract and the remedy to enforce it are both derived from the municipal law, the rule of decision and the rule of proceeding must be sought in the same code. In other cases, it is necessary to distinguish with accuracy between the obligation and the remedy.

The obligation of the contract, then, may be said to consist of the following parts: —

1. The personal capacity of the parties to contract.

(*a*) [Including the statutes of limitations, which are those of the country where the suit is brought, and not those of the *lex loci contractus*. Howard's Rep. vol. ix. p. 407, Townsend *v.* Jamison.]

2. The will of the parties expressed, as to the terms and conditions of the contract.

3. The external form of the contract.

The personal capacity of parties to contract depends upon those personal qualities which are annexed to their civil condition, by the municipal law of their own State, and which travel with them wherever they go, and attach to them in whatever foreign country they are temporarily resident. Such are the privileges and disabilities conferred by the *lex domicilii* in respect to majority and minority, marriage and divorce, sanity or lunacy, and which determine the capacity or incapacity of parties to contract, independently of the law of the place where the contract is made, or that of the place where it is sought to be enforced.

It is only those universal personal qualities, which the laws of all civilized nations concur in considering as essentially affecting the capacity to contract, which are exclusively regulated by the *lex domicilii*, and not those particular prohibitions or disabilities, which are arbitrary in their nature and founded upon local policy; such as the prohibition, in some countries, of noblemen and ecclesiastics from engaging in trade and forming commercial contracts. The qualities of a major or minor, of a married or single woman, &c., are universal personal qualities, which, with all the incidents belonging to them, are ascertained by the *lex domicilii*, but which are also everywhere recognized as forming essential ingredients in the capacity to contract.[1]

Bankruptcy.

How far bankruptcy ought to be considered as a privilege or disability of this nature, and thus be restricted in its operation to the territory of that State under whose bankrupt code the proceedings take place, is, as already stated, a question of difficulty, in respect to which no constant and uniform usage prevails among nations. Supposing the bankrupt code of any country to form a part of the obligation of every contract made in that country with its citizens, and that every such contract is subject to the implied condition, that the debtor may be discharged from his obligation in the manner prescribed by the bankrupt laws, it would seem, on principle, that a certifi-

[1] Pardessus, Droit Commercial, Pt. VI. tit. 7 ch. 2, § 1.

cate of discharge ought to be effectual in the tribunals of any other State where the creditor may bring his suit. If, on the other hand, the bankrupt code merely forms a part of the remedy for a breach of the contract, it belongs to the *lex fori*, which cannot operate extraterritorially within the jurisdiction of any other State having the exclusive right of regulating the proceedings in its own courts of justice; still less can it have such an operation where it is a mere partial modification of the remedy, such as an exemption from arrest, and imprisonment of the debtor's person on a *cessio bonorum*. Such an exemption being strictly local in its nature, and to be administered, in all its details, by the tribunals of the State creating it, cannot form a law for those of any foreign State. But if the exemption from arrest and imprisonment, instead of being merely contingent upon the failure of the debtor to perform his obligation through insolvency, enters into and forms an essential ingredient in the original contract itself, by the law of the country where it is made, it cannot be enforced in any other State by the prohibited means. Thus by the law of France, and other countries where the *contrainte par corps* is limited to commercial debts, an ordinary debt contracted in that country by its subjects cannot be enforced by means of personal arrest in any other State, although the *lex fori* may authorize imprisonment for every description of debts.[1]

The obligation of the contract consists of the will of the parties, expressed as to its terms and conditions.

The interpretation of these depends, of course, upon the *lex loci contractus*, as do also the nature and extent of those implied conditions which are annexed to the contract by the local law or usage. Thus the rate of interest, unless fixed by the parties, is allowed by the law as damages for the detention of the debt, and the proceedings to recover these damages may strictly be considered as a part of the remedy. The rate of interest is, however, regulated by the law of the place where the contract is made, unless, indeed, it appears that the parties had in view the law of some other country. In that case, the lawful rate of inte-

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[1] Bosanquet & Puller's Rep. vol. i. p. 131. Melan *v.* The Duke of Fitz-James.

rest of the place of payment, or to which the loan has reference, by security being taken upon property there situate, will control the *lex loci contractus*.[1]

The external form of the contract constitutes an essential part of its obligation.

This must be regulated by the law of the place of contract, which determines whether it must be in writing, or under seal, or executed with certain formalities before a notary, or other public officer, and how attested. A want of compliance with these requisites renders the contract void *ab initio*, and being void by the law of the place, it cannot be carried into effect in any other State. But a mere fiscal regulation does not operate extraterritorially; and therefore the want of a stamp, required by the local law to be impressed on an instrument, cannot be objected where it is sought to be enforced in the tribunals of another country.

There is an essential difference between the form of the contract and the extrinsic evidence by which the contract is to be proved. Thus the *lex loci contractus* may require certain contracts to be in writing, and attested in a particular manner, and a want of compliance with these forms will render them entirely void. But if these forms are actually complied with, the extrinsic evidence, by which the existence and terms of the contract are to be proved in a foreign tribunal, is regulated by the *lex fori*.

§ 21. Conclusiveness of foreign judgments in personal actions.

The most eminent public jurists concur in asserting the principle, that a final judgment, rendered in a personal action, in the courts of competent jurisdiction of one State, ought to have the conclusive effect of a *res adjudicata* in every other State, wherever it is pleaded in bar of another action for the same cause.[2]

But no sovereign is bound, unless by special compact, to execute within his dominions a judgment rendered by the tribunals of another State; and if execution be sought by suit upon the

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[1] Kent's Comm. on American Law, vol. ii. p. 459, fifth edit. Fœlix, Droit International Privé, § 85.

[2] Vattel, liv. ii. ch. vii. §§ 84, 85. Martens, Droit des Gens, §§ 93, 94, 95. Klüber, Droit des Gens, § 59. Deutsche Bundes Recht, § 366.

judgment, or otherwise, the tribunal in which the suit is brought, or from which execution is sought, is, on principle, at liberty to examine into the merits of such judgment, and to give effect to it or not, as may be found just and equitable.[1] The general comity, utility, and convenience of nations have, however, established a usage among most civilized States, by which the final judgments of foreign courts of competent jurisdiction are reciprocally carried into execution, under certain regulations and restrictions, which differ in different countries.[2]

Law of England.

By the law of England, the judgment of a foreign tribunal, of competent jurisdiction, is conclusive where the same matter comes incidentally in controversy between the same parties; and full effect is given to the *exceptio rei judicatæ*, where it is pleaded in bar of a new suit for the same cause of action. A foreign judgment is *primâ facie* evidence, where the party claiming the benefit of it applies to the English courts to enforce it, and it lies on the defendant to impeach the justice of it, or to show that it was irregularly obtained. If this is not shown, it is received as evidence of a debt, for which a new judgment is rendered in the English court, and execution awarded. But if it appears by the record of the proceedings, on which the original judgment was founded, that it was unjustly or fraudulently obtained, without actual personal notice to the party affected by it; or if it is clearly and unequivocally shown, by extrinsic evidence, that the judgment has manifestly proceeded upon false premises or inadequate reasons, or upon a palpable mistake of local or foreign law; it will not be enforced by the English tribunals.[3]

American law.

The same jurisprudence prevails in the United States of America, in respect to judgments and decrees rendered by the tribunals of a State foreign to the Union. As between the different States of the Union itself, a judgment obtained in one State has the same credit and effect in all the other States, which it has by the laws of that State where it was

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[1] Kent's Comm. vol. ii. p. 119, 5th edit.

[2] Fœlix, §§ 292–311.

[3] Knapp's Rep. in the Privy Council, vol. i. p. 274: Frankland *v.* McGusty. Barnewall & Adolphus's Rep. vol. ii. p. 757: Novelli *v.* Rossi; vol. iii. p. 951: Becquet *v.* M'Carthy.

obtained; that is, it has the conclusive effect of a domestic judgment.[1]

The law of France restrains the operation of foreign judgments within narrower limits. Judgments obtained in a foreign country against French subjects are not conclusive, either where the same matter comes again incidentally in controversy, or where a direct suit is brought to enforce the judgment in the French tribunals. And this want of comity is even carried so far, that, where a French subject commences a suit in a foreign tribunal, and judgment is rendered against him, the exception of *lis finita* is not admitted as a bar to a new action by the same party, in the tribunals of his own country. If the judgment in question has been obtained against a foreigner, subject to the jurisdiction of the tribunal where it was pronounced, it is conclusive in bar of a new action in the French tribunals, between the same parties. But the party who seeks to enforce it must bring a new suit upon it, in which the judgment is *primâ facie* evidence only; the defendant being permitted to contest the merits, and to show not only that it was irregularly obtained, but that it is unjust and illegal.[2] Law of France.

The execution of foreign judgments *in personam* is reciprocally allowed, by the law and usage of the different States of the Germanic Confederation, and of the European continent in general, except Spain, Portugal, Russia, Sweden, Norway, France, and the countries whose legislation is based on the French civil code.[3]

A decree of divorce obtained in a foreign country, by a fraudulent evasion of the laws of the State to which the parties belong, would seem, on principle, to be clearly void in the country of their domicile, where the marriage took place, though valid under the laws of the country where the divorce was obtained. Such are divorces obtained by parties going into Foreign divorces.

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[1] Cranch's Rep. vol. vii. pp. 481–484: Mills *v.* Duryee. Wheaton's Rep. vol. iii. p. 234: Hampton *v.* M'Connel.

[2] Code Civil, art. 2123, 2128. Code de Procédure Civil, art. 546. Pardessus, Droit Commercial, Pt. VI. tit. 7, ch. 2, § 2, No. 1488. Merlin, Répertoire, tom. vi. tit. *Jugement*. Questions de Droit, tom. iii. tit. *Jugement*. Toullier, Droit Civil Français, tom. x. Nos. 76–86.

[3] Fœlix, Droit International Privé, §§ 293–311.

another country for the sole purpose of obtaining a dissolution of the nuptial contract, for causes not allowed by the laws of their own country, or where those laws do not permit a divorce *à vinculo* for any cause whatever. This subject has been thrown into almost inextricable confusion, by the contrariety of decisions between the tribunals of England and Scotland; the courts of the former refusing to recognize divorces *à vinculo* pronounced by the Scottish tribunals, between English subjects who had not acquired a *bonâ fide* permanent domicile in Scotland; whilst the Scottish courts persist in granting such divorces in cases where, by the law of England, Ireland, and the colonies connected with the United Kingdom, the authority of parliament alone is competent to dissolve the marriage, so as to enable either party, during the lifetime of the other, again to contract lawful wedlock.[1]

In the most recent English decision on this subject, the House of Lords, sitting as a Court of Appeals in a case coming from Scotland, and considering itself bound to administer the law of Scotland, determined that the Scottish courts had, by the law of that country, a rightful jurisdiction to decree a divorce between parties actually domiciled in Scotland, notwithstanding the marriage was contracted in England. But the Court did not decide what effect such a divorce would have, if brought directly in question in an English court of justice.[2] (*a*)

In the United States, the rule appears to be conclusively settled that the *lex loci* of the State, in which the parties are *bonâ fide* domiciled, gives jurisdiction to the local courts to decree a divorce, for any cause recognized as sufficient by the local law, without regard to the law of that State where the marriage was

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[1] Dow's Parliament. Cases, vol. i. p. 117: Tovey *v.* Lindsay, p. 124. Lolly's case. See Fergusson's Reports of Decisions in the Consistorial Courts of Scotland, *passim.*

[2] Warrender *v.* Warrender, Bligh. Rep. vol. ix. p. 89. S. C. Clark & Finnell. Rep. vol. ii. p. 488.

(*a*) [The *status* of parties, domiciled subjects of and married in America, is not so affected by a sentence pronounced at and founded on a rule of law peculiar to Rome, the persons being then resident at Rome and coming subsequently to England, that an English forum would, by reason of such sentence, refuse to entertain questions arising out of the married state of such persons. English Law and Equity Reports, vol. ii. p. 570. Connelly *v.* Connelly.]

originally contracted.[1] This, of course, excludes such divorces as are obtained in fraudulent evasion of the laws of one State, by parties removing into another for the sole purpose of procuring a divorce.[2]

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1 Dorsey *v.* Dorsey, Chandler's Law Reporter, vol. i. p. 287.
2 Kent's Comm. vol. ii. p. 107, 5th edit.

CHAPTER III.

RIGHTS OF EQUALITY.

§ 1. Natural equality of States modified by compact or usage.

THE natural equality of sovereign States may be modified by positive compact, or by consent implied from constant usage, so as to entitle one State to superiority over another in respect to certain external objects, such as rank, titles, and other ceremonial distinctions.

§ 2. Royal honors.

Thus the international law of Europe has attributed to certain States what are called *royal honors*, which are actually enjoyed by every empire or kingdom in Europe, by the Pope, the grand duchies in Germany, and the Germanic and Swiss Confederations. They were also formerly conceded to the German empire, and to some of the great republics, such as the United Netherlands and Venice.

These *royal honors* entitle the States by which they are possessed to precedence over all others who do not enjoy the same rank, with the exclusive right of sending to other States public ministers of the first rank, as ambassadors, together with certain other distinctive titles and ceremonies.[1]

§ 3. Precedence among princes and States enjoying royal honors.

Among the princes who enjoy this rank, the Catholic powers concede the precedency to the Pope, or sovereign pontiff; but Russia and the Protestant States of Europe consider him as Bishop of Rome only, and a sovereign prince in Italy, and such of them as enjoy royal honors refuse him the precedence.

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[1] Vattel, Droit des Gens, tom. i. liv. ii. ch. 3, § 38. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. iii. ch. 2, § 129. Klüber, Droit des Gens Moderne, pt. ii. tit. 1, ch. 3, §§ 91, 92. Heffter, Europäische Völkerrecht, § 28.

The Emperor of Germany, under the former constitution of the empire, was entitled to precedence over all other temporal princes, as the supposed successor of Charlemagne and of the Cæsars in the empire of the West; but since the dissolution of the late Germanic constitution, and the abdication of the titles and prerogatives of its head by the Emperor of Austria, the precedence of this sovereign over other princes of the same rank may be considered questionable.[1]

The various contests between crowned heads for precedence are matter of curious historical research as illustrative of European manners at different periods; but the practical importance of these discussions has been greatly diminished by the progress of civilization, which no longer permits the serious interests of mankind to be sacrificed to such vain pretensions.

The text-writers commonly assigned to what were called the *great republics*, who were entitled to royal honors, a rank inferior to crowned heads of that class; and the United Netherlands, Venice, and Switzerland, certainly did formerly yield the precedence to emperors and reigning kings, though they contested it with the electors and other inferior princes entitled to royal honors. But disputes of this sort have commonly been determined by the relative power of the contending parties, rather than by any general rule derived from the form of government. Cromwell knew how to make the dignity and equality of the English Commonwealth respected by the crowned heads of Europe; and in the different treaties between the French Republic and other powers, it was expressly stipulated that the same ceremonial as to rank and etiquette should be observed between them and France which had subsisted before the revolution.[2] The great Republics.

Those monarchical sovereigns who are not crowned heads, but who enjoy royal honors, concede the precedence on all occasions to emperors and kings.

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[1] Martens, § 152. Klüber, § 95.

[2] Treaty of Campo Formio, art. 23, and of Luneville, art. 17, with Austria. Treaties of Basle with Prussia and Spain. Schoell, Histoire des Traités de Paix, tom. i. p. 610. Edit. Bruxelles.

Monarchical sovereigns who do not enjoy royal honors yield the precedence to those princes who are entitled to these honors.

Semi-sovereign or dependent States rank below sovereign States.[1]

Semi-sovereign States, and those under the protection or *Suzeraineté* of another sovereign State, necessarily rank below that State on which they are dependent. But where third parties are concerned, their relative rank must be determined by other considerations; and they may even take precedence of States completely sovereign, as was the case with the electors under the former constitution of the Germanic empire, in respect to other princes not entitled to royal honors.[2]

These different points respecting the relative rank of sovereigns and States have never been determined by any positive regulation or international compact: they rest on usage and general acquiescence. An abortive attempt was made at the Congress of Vienna to classify the different States of Europe, with a view to determine their relative rank. At the sitting of the 10th December, 1814, the plenipotentiaries of the eight powers who signed the treaty of peace at Paris, named a committee to which this subject was referred. At the sitting of the 9th February, 1815, the report of the committee, which proposed to establish three classes of powers, relatively to the rank of their respective ministers, was discussed by the Congress; but doubts having arisen respecting this classification, and especially as to the rank assigned to the great republics, the question was indefinitely postponed, and a regulation established determining merely the relative rank of the diplomatic agents of crowned heads.[3]

§ 4. Usage of the *alternat.*

Where the rank between different States is equal or undetermined, different expedients have been resorted to for the purpose of avoiding a contest, and at the same time reserving the respective rights and pretensions of the parties. Among these is what is called the usage of the *alternat*, by which the rank and places of different powers are changed from time to

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[1] Klüber, § 98.

[2] Heffter, Das Europäische Völkerrecht, § 28, No. III.

[3] Klüber, Acten des Weiner Congresses, tom. viii. pp. 98, 102, 108, 116.

time, either in a certain regular order, or one determined by lot. Thus, in drawing up public treaties and conventions, it is the usage of certain powers to *alternate*, both in the preamble and the signatures, so that each power occupies, in the copy intended to be delivered to it, the first place. The regulation of the Congress of Vienna, above referred to, provides that in acts and treaties between those powers which admit the *alternat*, the order to be observed by the different ministers shall be determined by lot.[1]

Another expedient which has frequently been adopted to avoid controversies respecting the order of signatures to treaties and other public acts, is that of signing in the order assigned by the *French* alphabet to the respective Powers represented by their ministers.[2]

§ 5. Language used in diplomatic intercourse.

The primitive equality of nations authorizes each nation to make use of its own language in treating with others, and this right is still, in a certain degree, preserved in the practice of some States. But general convenience early suggested the use of the Latin language in the diplomatic intercourse between the different nations of Europe. Towards the end of the fifteenth century, the preponderance of Spain contributed to the general diffusion of the Castilian tongue as the ordinary medium of political correspondence. This, again, has been superseded by the language of France, which, since the age of Louis XIV., has become the almost universal diplomatic idiom of the civilized world. Those States which still retain the use of their national language in treaties and diplomatic correspondence, usually annex to the papers transmitted by them a translation in the language of the opposite party, wherever it is understood that this comity will be reciprocated. Such is the usage of the Germanic Confederation, of Spain, and the Italian courts. Those States which have a common language generally use it in their transactions with each other. Such is the case between the Germanic Confederation and its different members, and between the respective members them-

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[1] Annexe, xvii. à l'Acte du Congrès de Vienne, art 7.

[2] Klüber, Uebersicht der diplomatischen Verhandlungen des Wiener Congresses, § 164.

selves; between the different States of Italy; and between Great Britain and the United States of America.

§ 6. Titles of sovereign princes and States.

All sovereign princes or States may assume whatever titles of dignity they think fit, and may exact from their own subjects these marks of honor. But their recognition by other States is not a matter of strict right, especially in the case of new titles of higher dignity, assumed by sovereigns. Thus the royal title of King of Prussia, which was assumed by Frederick I. in 1701, was first acknowledged by the Emperor of Germany, and subsequently by the other princes and States of Europe. It was not acknowledged by the Pope until the reign of Frederick William II. in 1786, and by the Teutonic knights until 1792, this once famous military order still retaining the shadow of its antiquated claims to the Duchy of Prussia until that period.[1] So also the title of Emperor of all the Russias, which was taken by the Czar, Peter the Great, in 1701, was successively acknowledged by Prussia, the United Netherlands, and Sweden in 1723, by Denmark in 1732, by Turkey in 1739, by the emperor and the empire in 1745–6, by France in 1745, by Spain in 1750, and by the Republic of Poland in 1764. In the recognition of this title by France, a reservation of the right of precedence claimed by that crown was insisted on, and a stipulation entered into by Russia in the form of a *Réversale*, that this change of title should make no alteration in the ceremonies observed between the two courts. On the accession of the Empress Catharine II. in 1762, she refused to renew this stipulation in that form, but *declared* that the imperial title should make no change in the ceremonial observed between the two courts. This declaration was answered by the court of Versailles in a counter declaration, renewing the recognition of that title, upon the express condition, that, if any alteration should be made by the court of St. Petersburg in the rules previously observed by the two courts as to rank and precedence, the French crown would resume its ancient style, and cease to give the title of Imperial to that of Russia.[2]

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[1] Ward's History of the Law of Nations, vol. ii. pp. 245–248. Klüber, Droit des Gens Moderne de l'Europe, pt. ii. tit. 1, ch. 2, § 107, note *c*.

[2] Flassan, Histoire de la Diplomatie Française, tom. vi. liv. iii. pp. 328–364.

The title of Emperor, from the historical associations with which it is connected, was formerly considered the most eminent and honorable among all sovereign titles; but it was never regarded by other crowned heads as conferring, except in the single case of the Emperor of Germany, any prerogative or precedence over those princes.

§ 7. Maritime ceremonials.

The usage of nations has established certain maritime ceremonials to be observed, either on the ocean, or those parts of the sea over which a sort of supremacy is claimed by a particular State.

Among these is the salute by striking the flag or the sails, or by firing a certain number of guns on approaching a fleet or a ship of war, or entering a fortified port or harbor.

Every sovereign State has the exclusive right, in virtue of its independence and equality, to regulate the maritime ceremonial to be observed by its own vessels towards each other, or towards those of another nation, on the high seas, or within its own territorial jurisdiction. It has a similar right to regulate the ceremonial to be observed within its own exclusive jurisdiction by the vessels of all nations, as well with respect to each other, as towards its own fortresses and ships of war, and the reciprocal honors to be rendered by the latter to foreign ships. These regulations are established either by its own municipal ordinances, or by reciprocal treaties with other maritime powers.[1]

Where the dominion claimed by the State is contested by foreign nations, as in the case of Great Britain in the Narrow Seas, the maritime honors to be rendered by its flag are also the subject of contention. The disputes on this subject have not unfrequently formed the motives or pretexts for war between the powers asserting these pretensions, and those by whom they were resisted. The maritime honors required by Denmark, in consequence of the supremacy claimed by that power over the Sound and Belts, at the entrance of the Baltic Sea, have been regulated and modified by different treaties with other States, and espe-

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[1] Bynkershoek, de Dominio Maris, cap. 2, 4. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. iv. ch. 4, § 159. Klüber, Droit des Gens Moderne de l'Europe, pt. ii. tit. 1, ch. 3, §§ 117–122.

cially by the convention of the 15th of January, 1829, between Russia and Denmark, suppressing most of the formalities required by former treaties. This convention is to continue in force until a general regulation shall be established among all the maritime powers of Europe, according to the protocol of the Congress of Aix la Chapelle, signed on the 9th November, 1818, by the terms of which it was agreed, by the ministers of the five great powers, Austria, France, Great Britain, Prussia, and Russia, that the existing regulations observed by them should be referred to the ministerial conferences at London, and that the other maritime powers should be invited to communicate their views of the subject in order to form some such general regulation.[1]

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[1] J. H. W. Schlegel, Staats Recht des Königreichs Dänemark, 1 Theil, p. 412. Martens, Nouveau Recueil, tom. viii. p. 73. Ortolan, Diplomatie de la Mer, t. i. liv. 2, chap. 15.

CHAPTER IV.

RIGHTS OF PROPERTY.

§ 1. National proprietary rights.

THE exclusive right of every independent State to its territory and other property, is founded upon the title originally acquired by occupancy, conquest, or cession, and subsequently confirmed by the presumption arising from the lapse of time, or by treaties and other compacts with foreign States. (*a*)

§ 2. Public and private property.

This exclusive right includes the public property or domain of the State, and those things belonging to private individuals, or bodies corporate, within its territorial limits.

§ 3. Eminent domain.

The right of the State to its public property or domain is *absolute*, and excludes that of its own subjects as well as other nations. The national proprietary right, in respect to those things belonging to private individuals, or bodies corporate, within its territorial limits, is *absolute*, so far as it excludes that of other nations; but, in respect to the members of the State, it is *paramount* only, and forms what is called the eminent domain;[1] that is, the right, in case of necessity or for the public safety, of disposing of all the property of every kind within the limits of the State.

(*a*) [See, on the subject of the inviolability of national territory, the correspondence between Mr. Webster and Lord Ashburton, in the case of the Caroline, destroyed at Schlosser, in December, 1837. Webster's Works, vol. vi. p. 292.]

[1] Vattel, Droit des Gens, liv. i. ch. 20, §§ 235, 244. Rutherforth's Inst. of Natural Law, vol. ii. ch. 9, § 6. das Hefftter, Europäische Völkerrecht, §§ 64, 69, 70.

§ 4. Prescription.

The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, is justly applicable, as between nation and nation; but the constant and approved practice of nations shows that, by whatever name it be called, the uninterrupted possession of territory, or other property, for a certain length of time, by one State, excludes the claim of every other; in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question. This rule is founded upon the supposition, confirmed by constant experience, that every person will naturally seek to enjoy that which belongs to him; and the inference fairly to be drawn from his silence and neglect, of the original defect of his title, or his intention to relinquish it.[1] (*a*)

§ 5. Conquest and discovery confirmed by compact and the lapse of time.

The title of almost all the nations of Europe to the territory now possessed by them, in that quarter of the world, was originally derived from conquest, which has been subsequently confirmed by long possession and international compacts, to which all the European States have successively become parties. Their claim to the possessions held by them in the New World, discovered by Columbus and other adventurers, and to the territories which they

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[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 4. Puffendorf, Jus Naturæ et Gentium, lib. iv. cap. 12. Vattel, Droit des Gens, tome i. liv. ii. ch. 11. Rutherforth's Inst. of Natural Law, vol. i. ch. 8; vol. ii. ch. 9, §§ 3, 6.

"Sic qui rem suam ab alio teneri scit, nec quicquam contradicit multo tempore, is nisi causâ alia manifeste appareat, non videtur id alio fecisse animo, quàm quôd rem illam in suaram rerum numero esse nollet." Grotius in loc. cit.

(*a*) [This same principle was recognized as the rule, in the suit of Rhode Island against Massachusetts, in reference to the northern boundary of the former State, decided in 1846. The Court said: — "No human transactions are unaffected by time. Its influence is seen over all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which, consequently, fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary." Howard's Rep. vol. iv. p. 639, Rhode Island *v.* Massachusetts.]

have acquired on the continents and islands of Africa and Asia, was originally derived from discovery, or conquest and colonization, and has since been confirmed in the same manner, by positive compact. Independently of these sources of title, the general consent of mankind has established the principle, that long and uninterrupted possession by one nation excludes the claim of every other. Whether this general consent be considered as an implied contract, or as positive law, all nations are equally bound by it; since all are parties to it, since none can safely disregard it without impugning its own title to its possessions, and since it is founded upon mutual utility, and tends to promote the general welfare of mankind.

The Spaniards and Portuguese took the lead among the nations of Europe, in the splendid maritime discoveries in the East and the West, during the fifteenth and sixteenth centuries. According to the European ideas of that age, the heathen nations of the other quarters of the globe were the lawful spoil and prey of their civilized conquerors, and as between the Christian powers themselves, the Sovereign Pontiff was the supreme arbiter of conflicting claims. Hence the famous bull, issued by Pope Alexander VI., in 1493, by which he granted to the united crowns of Castile and Arragon all lands discovered, and to be discovered, beyond a line drawn from pole to pole, one hundred leagues west from the Azores, or Western Islands, under which Spain has since claimed to exclude all other European nations from the possession and use, not only of the lands but of the seas in the New World west of that line. Independent of this papal grant, the right of prior discovery was the foundation upon which the different European nations, by whom conquests and settlements were successively made on the American continent, rested their respective claims to appropriate its territory to the exclusive use of each nation. Even Spain did not found her pretension solely on the papal grant. Portugal asserted a title derived from discovery and conquest to a portion of South America; taking care to keep to the eastward of the line traced by the Pope, by which the globe seemed to be divided between these two great monarchies. On the other hand, Great Britain, France, and Holland, disregarded the pretended authority of the papal see, and pushed their discoveries, conquests, and settlements, both in the East and West Indies; until conflicting with

the paramount claims of Spain and Portugal, they produced bloody and destructive wars between the different maritime powers of Europe. But there was one thing in which they all agreed, that of almost entirely disregarding the right of the native inhabitants of these regions. Thus the bull of Pope Alexander VI. reserved from the grant to Spain all lands, which had been previously occupied by any other *Christian* nation; and the patent granted by Henry VII. of England to John Cabot and his sons, authorized them "to seek out and discover all islands, regions, and provinces whatsoever, that may belong to heathens and infidels;" and "to subdue, occupy, and possess these territories, as his vassals and lieutenants." In the same manner, the grant from Queen Elizabeth to Sir Humphrey Gilbert empowers him to "discover such remote heathen and barbarous lands, countries, and territories, not actually possessed by any Christian prince or people, and to hold, occupy, and enjoy the same, with all their commodities, jurisdictions, and royalties." It thus became a maxim of policy and of law, that the right of the native Indians was subordinate to that of the first Christian discoverer, whose paramount claim excluded that of every other civilized nation, and gradually extinguished that of the natives. In the various wars, treaties, and negotiations, to which the conflicting pretensions of the different States of Christendom to territory on the American continents have given rise, the primitive title of the Indians has been entirely overlooked, or left to be disposed of by the States within whose limits they happened to fall, by the stipulations of the treaties between the different European powers. Their title has thus been almost entirely extinguished by force of arms, or by voluntary compact, as the progress of cultivation gradually compelled the savage tenant of the forest to yield to the superior power and skill of his civilized invader.[1]

Dispute between Great Britain and Spain, relating to Nootka Sound.

In the dispute which took place in 1790, between Great Britain and Spain, relative to Nootka Sound, the latter claimed all the north-western coast of America as far north as Prince William's Sound, in latitude 61°, upon the ground of prior discovery and long possession,

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[1] Wheaton's Rep. vol. viii. pp. 571–605: Johnson *v.* M'Intosh.

confirmed by the eighth article of the Treaty of Utrecht, referring to the state of possession in the time of his Catholic Majesty Charles II. This claim was contested by the British government, upon the principle that the earth is the common inheritance of mankind, of which each individual and each nation has a right to appropriate a share, by occupation and cultivation. This dispute was terminated by a convention between the two powers, stipulating that their respective subjects should not be disturbed in their navigation and fisheries in the Pacific Ocean or the South Seas, or in landing on the coasts of those seas, not already occupied, for the purpose of carrying on their commerce with the natives of the country, or of making settlements there, subject to the following provisions : —

1. That the British navigation and fishery should not be made the pretext for illicit trade with the Spanish settlements, and that British subjects should not navigate or fish within the space of ten marine leagues from any part of the coasts already occupied by Spain.

2. That in all parts of the north-western coasts of North America, or of the islands adjacent, situated to the north of the parts of the said coast already occupied by Spain, wherever the subjects of either of the two powers should have made settlements since the month of April, 1789, or should thereafter make any, the subjects of the other should have free access, and should carry on their trade without any disturbance or molestation.

3. That, with respect to the eastern and western coasts of South America, and the adjacent islands, no settlement should be formed thereafter, by the respective subjects, in such parts of those coasts as are situated to the south of those parts of the same coasts, and of the adjacent islands already occupied by Spain; provided that the respective subjects should retain the liberty of landing on the coasts and islands so situated, for the purposes of their fishery, and of erecting huts and other temporary buildings, for those purposes only.[1]

By an ukase of the Emperor Alexander of Russia, of the 4–16th September, 1821, an exclusive territorial right

Controversy between the

[1] Annual Register for 1790, (State Papers,) pp. 285–305; 1791, pp. 208, 214, 222–227. Greenhow, History of Oregon and California, p. 466: Proofs and Illustrations, K. No. 1.

United States and Russia, respecting the north-western coast of America.

on the north-west coast of America was asserted as belonging to the Russian Empire, from Behring's Straits to the 51st degree of north latitude, and in the Aleutian Islands, on the east coast of Siberia, and the Kurile Islands, from the same straits to the South Cape in the island of Ooroop, in 45° 51′ north latitude. The navigation and fishery of all other nations were prohibited in the islands, ports, and gulfs, within the above limits; and every foreign vessel was forbidden to touch at any of the Russian establishments above enumerated, or even to approach them, within a less distance than 100 Italian miles, under penalty of confiscation of the cargo. The proprietary rights of Russia to the extent of the north-west coast of America, specified in this decree, were rested upon the three bases said to be required by the general law of nations and immemorial usage; that is: upon the title of first discovery; upon the title of first occupation; and, in the last place, upon that which results from a peaceable and uncontested possession of more than half a century. It was added, that the extent of sea, of which the Russian possessions on the continents of Asia and America form the limits, comprehended all the conditions which were ordinarily attached to shut seas (*mers fermées*); and the Russian government might consequently deem itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners. But it preferred only asserting its essential rights, by measures adapted to prevent contraband trade within the chartered limits of the American Russian Company.

All these grounds were contested, in point of fact as well as right, by the American government. The Secretary of State, Mr. John Q. Adams, in his reply to the communication of the Russian Minister at Washington, stated, that from the period of the existence of the United States as an independent nation, their vessels had freely navigated these seas, and the right to navigate them was a part of that independence; as was also the right of their citizens to trade, even in arms and munitions of war, with the aboriginal natives of the north-west coast of America, who were not under the territorial jurisdiction of other nations. He totally denied the Russian claim to any part of America south of the 55th degree of north latitude, on the ground that this parallel was declared, in the charter of the Russian American

Company, to be the southern limit of the discoveries made by the Russians in 1799; since which period they had made no discoveries or establishments south of that line, on the coast claimed by them. With regard to the suggestion, that the Russian government might justly exercise sovereignty over the northern Pacific Ocean, as *mare clausum*, because it claimed territories both on the Asiatic and American coasts of that ocean, Mr. Adams merely observed, that the distance between those coasts on the parallel of 51 degrees, was not less than *four thousand miles;* and he concluded by expressing the persuasion of the American government, that the citizens of the United States would remain unmolested in the prosecution of their lawful commerce, and that no effect would be given to a prohibition, manifestly incompatible with their rights.[1]

Convention of 1824, between the United States and Russia.

The negotiations on this subject were finally terminated by a convention between the two governments, signed at Petersburg, on the 5–17th April, 1824, containing the following stipulations: —

"Art. 1. It is agreed that, in any part of the great ocean, commonly called the Pacific Ocean or South Sea, the respective citizens or subjects of the high contracting powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts, upon points which may not already have been occupied, for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following articles:

"Art. 2. With the view of preventing the rights of navigation and of fishing, exercised upon the great ocean by the citizens and subjects of the high contracting powers, from becoming the pretext for an illicit trade, it is agreed that the citizens of the United States shall not resort to any point where there is a Russian establishment, without the permission of the governor or commander; and that, reciprocally, the subjects of Russia shall not resort, without permission, to any establishment of the United States upon the north-west coast.

"Art. 3. It is moreover agreed, that hereafter, there shall not be

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[1] Annual Register, vol. lxiv. pp. 576–584. Correspondence between Mr. Secretary Adams and Mr. Poletica.

formed by the citizens of the United States, or under the authority of the said States, any establishment upon the north-west coast of America, nor in any of the islands adjacent, to the *north* of fifty-four degrees and forty minutes of north latitude; and that, in the same manner, there shall be none formed by Russian subjects, or under the authority of Russia, *south* of the same parallel.

"Art. 4. It is, nevertheless, understood, that, during a term of ten years, counting from the signature of the present Convention, the ships of both powers, or which belong to their citizens or subjects, respectively, may reciprocally frequent, without any hinderance whatever, the interior seas, gulfs, harbors, and creeks, upon the coast mentioned in the preceding article, for the purpose of fishing and trading with the natives of the country."

Convention of 1825 between Great Britain and Russia.

Great Britain had also formally protested against the claims and principles set forth in the Russian ukase of 1821, immediately on its promulgation, and subsequently at the Congress of Verona. The controversy, as between the British and Russian governments, was finally closed by a convention signed at Petersburg, February 16–28, 1825, which also established a permanent boundary between the territories respectively claimed by them on the continent and islands of North-western America.

This treaty contained the following stipulations: —

"Art. 1. It is agreed that the respective subjects of the high contracting parties shall not be troubled or molested in any part of the ocean commonly called the Pacific Ocean, either in navigating the same, in fishing therein, or in landing at such part of the coast as shall not have been already occupied, in order to trade with the natives, under the restrictions and conditions specified in the following articles: —

"Art. 2. In order to prevent the right of navigating and fishing, exercised upon the ocean by the subjects of the high contracting parties, from becoming the pretext for an illicit commerce, it is agreed that the subjects of his Britannic Majesty shall not land at any place where there may be a Russian establishment, without the permission of the governor or commandant; and, on the other hand, that Russian subjects shall not land, without permission, at any British establishment on the north-west coast."

By the 3d and 4th articles it was agreed that "the line of

demarcation between the possessions of the high contracting parties upon the coast of the continent and the islands of America to the north-west," should be drawn from the southernmost point of Prince of Wales's island, in latitude 54 degrees 40 minutes eastward, to the great inlet in the continent called Portland Channel, and along the middle of that inlet to the 56th degree of latitude, whence it should follow the summit of the mountains bordering the coast, within ten leagues northwestward, to Mount St. Elias, and thence north, in the course of the 141st meridian west from Greenwich, to the frozen ocean, "which line shall form the limit between the Russian and the British possessions in the continent of America to the northwest."

"Art. 5. It is, moreover, agreed that no establishment shall be formed by either of the two parties within the limits assigned by the two preceding articles to the possessions of the other. Consequently, British subjects shall not form any establishment, either upon the coast, or upon the border of the continent comprised within the limits of the Russian possessions, as designated in the two preceding articles; and, in like manner, no establishment shall be formed by Russian subjects beyond the said limits.

"Art. 6. It is understood that the subjects of his Britannic Majesty, from whatever quarter they may arrive, whether from the ocean or from the interior of the continent, shall forever enjoy the right of navigating freely, and without any hinderance whatever, all the rivers and streams which in their course towards the Pacific Ocean may cross the line of demarcation upon the line of coast described in article 3 of the present convention.

"Art. 7. It is also understood, that, for the space of ten years from the signature of the present Convention, the vessels of the two powers, or those belonging to their respective subjects, shall mutually be at liberty to frequent, without any hinderance whatever, all the inland seas, gulfs, havens, and creeks on the coast, mentioned in article 3, for the purpose of fishing and trading with the natives.

"Art. 8. The port of Sitka, or Novo Archangelsk, shall be open to the commerce and vessels of British subjects for the space of ten years, from the date of the exchange of the ratifications of the present convention. In the event of an extension of

this term being granted to any other power, the like extension shall be granted also to Great Britain.

"Art. 9. The above-mentioned liberty of commerce shall not apply to the trade in spirituous liquors, in fire-arms, or other arms, gunpowder or other warlike stores; the high contracting parties reciprocally engaging not to permit the above-mentioned articles to be sold or delivered, in any manner whatever, to the natives of the country.

The 10th and 11th articles contain regulations respecting British or Russian vessels, navigating the Pacific Ocean, and putting into the ports of the respective parties in distress; and for the settlement of all cases of complaint arising under the treaty.[1] (*a*)

Expiration of the Convention of 1824 between the United States and Russia.

In the mean time, the period of ten years, established by the 4th article of the Convention between the United States and Russia, during which the vessels of both nations might frequent the bays, creeks, harbors, and other interior waters on the north-western coast of America, had expired. The Russian government had chosen to consider that article as the only limitation of its right to exclude American vessels from all parts of the division of the coast, on which the United States stipulated to form no establishments; disregarding entirely the 1st article of the Convention, by which all unoccupied places on the north-western coast were declared free and open to the citizens or subjects of both parties — American vessels were consequently prohibited by the Russian authorities from trading on the unoccupied parts of that coast, north of the parallel of 54th degree 40 minutes. The American government protested against this prohibition, and at the same time, proposed to the Russian government to renew the stipulations of the Convention of 1824, for an indefinite period of time.[2]

In the letter of instructions from the Secretary of State, Mr. Forsyth, to the American Minister at Petersburg, it was stated, that if the 4th article was to be considered as merely applicable

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[1] Greenhow, History of Oregon and California, p. 469: Proofs and Illustrations. I. No. 5.

(*a*) [In the treaty of commerce, of June 11, 1843, between Great Britain and Russia, it is provided that the convention of February, 1825, shall govern as to the trade on the north-west coast of America. Parliamentary Papers, 1843.]

[2] Greenhow, pp. 343–361.

to parts of the coast unoccupied, then it merely provided for the temporary enjoyment of a privilege which existed in perpetuity, under the law of nations, and which had been expressly declared so to exist by a previous article of the Convention. Containing, therefore, no provision not embraced in the preceding article, it would be useles and of no effect. But the rule in regard to the construction of an instrument, of whatever kind, was, that it should be so construed, if possible, as that every part may stand.

If the article were construed to include points of the coast already occupied, it then took effect, thus far, as a temporary exception to a perpetual prohibition, and the only consequence of the expiration of the term to which it was limited, would be the immediate and continued operation of the prohibition.

It was still more reasonable to understand it, however, as intended to grant permission to enter interior bays, &c., at the mouths of which there might be establishments, or the shores of which might be, in part, but not wholly, occupied by such establishments, thus providing for a case which would otherwise admit of doubt, as without the 4th article it would be questionable whether the bays, &c., described in it belonged to the first or second article.

In no sense could it be understood as implying an acknowledgment, on the part of the United States, of the right of Russia to the possession of the coast above the latitude of 54 degrees 40 minutes north. It must be taken in connection with the other articles of the Convention, which had, in fact, no reference whatever to the question of the right of possession of the unoccupied part of the coast. In a spirit of compromise, and to prevent future collisions or difficulties, it was agreed that no new establishments should be formed by the respective parties to the north or south of a certain parallel of latitude, after the conclusion of the agreement; but the question of the right of possession beyond the existing establishments, as it subsisted previously to, or at the time of the conclusion of the convention, was left untouched. The United States, in agreeing not to form new establishments to the north of latitude 54 degrees 40 minutes north, made no acknowledgment of the right of Russia to the territory above that line. If such an admission had been made, Russia, by the same construction of the article, must have acknowledged the right of the United States to the territory

south of the designated line. But that Russia did not so understand the article, was conclusively proved by her having entered into a similar agreement in a subsequent treaty (1825) with Great Britain; and having, in fact, acknowledged in that instrument the right of the same territory by Great Britain. The United States could only be considered as acknowledging the right of Russia to acquire, by actual occupation, a just claim to unoccupied lands above the latitude 54 degrees 40 minutes north; and even this was mere matter of inference, as the Convention of 1824 contains nothing more than a negation of the right of the United States to occupy new points within that limit.

Admitting that this inference was just, and was in contemplation of the parties to the Convention, it would not follow that the United States ever intended to abandon the just right acknowledged by the first article to belong to them under the law of nations, i. e. to frequent any part of the unoccupied coasts of North America, for the purpose of fishing or trading with the natives. All that the Convention admitted was an inference of the right of Russia to acquire possession by settlement north of 54 degrees 40 minutes north. Until that actual possession was taken, the first article of the Convention acknowledged the right of the United States to fish and trade as prior to its negotiation. This was not only the just construction, but it was the one both parties were interested in putting upon the instrument, as the benefits were equal and mutual, and the object of the Convention, to avoid converting the exercise of the common right into a dispute about exclusive privilege, was secured by it.

These arguments were not controverted by the Russian cabinet, which, however, declined the proposition for a renewal of the engagements contained in the 4th article, and the matter still rests on the same footing.[1]

Claim of the United States to the Oregon territory.

The claim of the United States to the territory between the Rocky Mountains and the Pacific Ocean, and between the 42d degree and 54th degrees and 40 minutes of north latitude, is rested by them upon the following grounds: —

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[1] Mr. Forsyth's letter to Mr. Dallas, Nov. 3, 1837. Congress. Documents, Sess. 1838-9. Vol. i. p. 36. Greenhow, pp. 361-363

1. The first discovery of the mouth of the river Columbia by Captain Gray, of Boston, in 1792; the first discovery of the sources of that river, and the exploration of its course to the sea, by Captains Lewis and Clarke, in 1805–6; and the establishment of the first posts and settlements in the territory in question by citizens of the United States.

2. The virtual recognition by the British government of the title of the United States in the restitution of the settlement of Astoria or Fort George, at the mouth of the Columbia River, which had been captured by the British during the late war between the two countries, and which was restored in virtue of the 1st article of the treaty of Ghent, 1814, stipulating that "all territory, places, and possessions whatever, taken by either party from the other during the war," &c., "shall be restored without delay." This restitution was made, without any reservation or exception whatsoever, communicated at the time to the American government.

3. The acquisition by the United States of all the titles of Spain, which titles were derived from the discovery of the coasts of the region in question, by Spanish subjects, before they had been seen by the people of any other civilized nation. By the 3d article of the treaty of 1819, between the United States and Spain, the boundary line between the two countries, west of the Mississippi, was established from the mouth of the river Sabine, to certain points on the Red River and the Arkansas, and running along the parallel of 42 degrees north of the South Sea; his Catholic Majesty ceding to the United States "all his rights, claims, and pretensions, to any territories east and north of the said line; and" renouncing "for himself, his heirs and successors, all claim to the said territories forever." The boundary thus agreed on with Spain was confirmed by the treaty of 1828, between the United States and Mexico, which had, in the mean time, become independent of Spain.

4. Upon the ground of *contiguity*, which should give to the United States a stronger right to those territories than could be advanced by any other power. "If," said Mr. Gallatin, "a few trading factories on the shores of Hudson's Bay have been considered by Great Britain as giving an exclusive right of occupancy as far as the Rocky Mountains; if the infant settlements on the more southern Atlantic shores justified a claim thence to

the South Seas, and which was actually enforced to the Mississippi; that of the millions of American citizens already within reach of those seas, cannot consistently be rejected. It will not be denied that the extent of contiguous country to which an actual settlement gives a prior right, must depend, in a considerable degree, on the magnitude and population of that settlement, and on the facility with which the vacant adjacent land may, within a short time, be occupied, settled, and cultivated by such population, compared with the probability of its being occupied and settled from any other quarter. This doctrine was admitted to its fullest extent by Great Britain, as appeared by all her charters, extending from the Atlantic to the Pacific, given to colonies established then only on the borders of the Atlantic. How much more natural and stronger the claim, when made by a nation whose population extended to the central parts of the continent, and whose dominions were by all acknowledged to extend to the Rocky Mountains."

The exclusive claim of the United States is opposed by Great Britain on the following grounds: —

1. That the Columbia was not discovered by Gray, who had only entered its mouth, discovered four years previously by Lieutenant Meares of the British navy; and that the exploration of the interior borders of the Columbia by Lewis and Clarke could not be considered as confirming the claim of the United States, because, if not before, at least in the same and subsequent years, the British Northwest Company had, by means of their agents, already established their posts on the head waters or main branch of the river.

2. That the restitution of Astoria, in 1818, was accompanied by express reservations of the claim of Great Britain to that territory, upon which the American settlement must be considered an encroachment.

3. That the titles to the territory in question, derived by the United States from Spain through the treaty of 1819, amounted to nothing more than the rights secured to Spain equally with Great Britain by the Nootka Sound Convention of 1790: namely, to settle on any part of those countries, to navigate and fish in their waters, and to trade with the natives.

4. That the charters granted by British sovereigns to colonies on the Atlantic coasts were nothing more than cessions to the

grantees of whatever rights the grantor might consider himself to possess, and could not be considered as binding the subjects of any other nation, or as part of the law of nations, until they had been confirmed by treaties.

During the negotiation of 1827, the British plenipotentiaries, Messrs. Huskisson and Addington, presented the pretensions of their government in respect to the territory in question in a statement, of which the following is a summary.

"Great Britain claims no exclusive sovereignty over any portion of the territory on the Pacific, between the 42d and the 49th parallels of latitude. Her present claim, not in respect to any part, but to the whole, is limited to a right of joint occupancy, in common with other States, leaving the right of exclusive dominion in *abeyance;* and her pretensions tend to the mere maintenance of her own rights, in resistance to the exclusive character of the pretensions of the United States.

"The rights of Great Britain are recorded and defined in the Convention of 1790. They embrace the right to navigate the waters of those countries, to settle in and over any part of them, and to trade with the inhabitants and occupiers of the same. These rights have been peaceably exercised ever since the date of that Convention; that is, for a period of nearly forty years. Under that Convention, valuable British interests have grown up in those countries. It is admitted that the United States possess the same rights, although they have been exercised by them only in a single instance, and have not, since the year 1813, been exercised at all; but beyond those rights they possess none.

"In the interior of the territory in question, the subjects of Great Britain have had, for many years, numerous settlements and trading-posts; several of these posts are on the tributary waters of the Columbia; several upon the Columbia itself; some to the northward, and others to the southward of that river. And they navigate the Columbia as the sole channel for the conveyance of their produce to the British stations nearest to the sea, and for its shipment thence to Great Britain; it is also by the Columbia and its tributary streams that these posts and settlements receive their annual supplies from Great Britain.

"To the interests and establishments which British industry and enterprise have created, Great Britain owes protection; that protection will be given, both as regards settlement, and freedom of trade and navigation, with every attention not to infringe the coördinate rights of the United States; it being the desire of the British government, so long as the joint occupancy continues, to regulate its own obligations by the same rules which govern the obligations of every other occupying party."[1]

By the 3d article of the Convention between the United States and Great Britain, in 1818, it was "agreed, that any country that may be claimed by either party, on the north-west coast of America, westward of the Stony Mountains, shall, together with its harbors, bays, and creeks, and the navigation of all rivers within the same, be free and open, for the term of ten years from the date of the signature of the present Convention, to the vessels, citizens, and subjects of the two powers; it being well understood that this agreement is not to be construed to the prejudice of any claim which either of the two high contracting parties may have to any part of the said country, nor shall it be taken to affect the claims of any other power or State to any part of the said country; the only object of the high contracting parties, in that respect, being to prevent disputes and differences amongst themselves."

In 1827, another Convention was concluded between the two parties, by which it was agreed: —

"Art. 1. All the provisions of the third article of the Convention concluded between the United States of America and his Majesty the King of the United Kingdom of Great Britain and Ireland, on the 20th of October, 1818, shall be, and they are, hereby, further indefinitely extended and continued in force, in the same manner as if all the provisions of the said article were herein specifically recited.

"Art. 2. It shall be competent, however, to either of the contracting parties, in case either should think fit at any time after the 20th of October, 1828, on giving due notice of twelve months to the other contracting party, to annul and abrogate this Con-

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[1] Congress Documents, 20th Cong. and 1st Sess. No. 199. Greenhow, Proofs and Illustrations, II.

vention; and it shall, in such case, be accordingly entirely annulled and abrogated, after the expiration of the said term of notice.

"Art. 3. Nothing contained in this Convention, or in the third article of the convention of the 20th of October, 1818, hereby continued in force, shall be construed to impair, or in any manner affect, the claims which either of the contracting parties may have to any part of the country westward of the Stony or Rocky Mountains."[1]

The notification provided for by the convention having been given by the American government, new discussions took place between the two governments, which were terminated by a treaty concluded at Washington, in 1846. By the first article of that treaty it was stipulated, that from the point on the 49th parallel of north latitude, where the boundary laid down in existing treaties and conventions between the United States and Great Britain terminates, the line of boundary shall be continued westward along the said 49th parallel of north latitude to the middle of the channel which separates the continent from Vancouver's Island, and thence southerly through the middle of the said channel, and of Fucas Straits, to the Pacific Ocean; provided, however, that the navigation of the whole of the said channel and straits, south of the 49th parallel of north latitude, remain free and open to both parties. The second article stipulated for the free navigation of the Columbia River by the Hudson's Bay Company, and the British subjects trading with them, from the 49th degree of north latitude to the ocean. The third article provided that the possessory rights of the Hudson's Bay Company, and of all other British subjects, to the territory south of the parallel of the 49th degree of north latitude, should be respected. (*a*)

§ 6. Maritime territorial jurisdiction.

The maritime territory of every State extends to the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands, belonging to the same State. The general usage of nations superadds to this extent of territorial jurisdiction a distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the State. Within these limits, its rights of property and

[1] Elliot's American Diplomatic Code, vol. i. pp. 282, 330.

(*a*) [United States Statutes at Large, vol. ix. pp. 109, 869.]

territorial jurisdiction are absolute, and exclude those of every other nation.[1] (*a*)

§ 7. Extent of the term *coasts* or *shore*.

The term "coasts" includes the natural appendages of the territory which rise out of the water, although these islands are not of sufficient firmness to be inhabited or fortified; but it does not properly comprehend all the shoals which form sunken continuations of the land perpetually covered with water. The rule of law on this subject is, *terræ dominium finitur, ubi finitur armorum vis;* and since the introduction of fire-arms, that distance has usually been recognized to be about three miles from the shore.[2] In a case before Sir W. Scott, (Lord Stowell,) respecting the legality of a capture alleged to be made within the neutral territory of the United States, at the mouth of the river Mississippi, a question arose as to what was to be deemed the shore, since there are a number of little mud islands, composed of earth and trees, drifted down by the river, which form a kind of portico to the main land. It was contended that these were not to be considered as any part of the American territory — that they were a sort of "no man's land," not of consistency enough to support the purposes of life, uninhabited, and resorted to only for shooting and taking birds' nests. It was argued that the line of territory was to be taken only from the Balize, which is a fort raised on made land by the former Spanish possessors. But the learned judge was of a

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[1] Grotius, de Jur. Bel. ac. Pac. lib. ii. cap. 3, § 10. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 8. De Dominio Maris, cap. 2. Vattel, liv. i. ch. 23, § 289. Valin, Comm. sur l'Ordonnance de la Marine, liv. v. tit. 1. Azuni, Diritto Marit. Pt. I. cap. 2, art. 3, § 15. Galiani, dei Doveri dei Principi Neutrali in Tempo di Guerra, liv. i. Life and Works of Sir L. Jenkins, vol. ii. p. 780.

(*a*) [Garden, Traité de la Diplomatie, t. i. p. 399. Hautefeuille, Droits des Nations neutres, t. i. p. 244.]

[2] Unde dominium maris proximi non ultra concedimus, quàm e terrâ illi imperari potest, et tamen eò usque; nulla siquidem sit ratio, cur mare, quod in alicujus imperio est et potestate, minus ejusdem esse dicamus, quàm fossam in ejus territorio. . . . . Quare omnino videtur rectius, eò potestatem terræ extendi, quousque tormenta exploduntur, eatenus quippe cùm imperare, tum possidere videmur. Loquor autem de his temporibus, quibus illis machinis utimur: alioquin generaliter dicendum esset, potestatem terræ finiri, ubi finitur armorum vis; etenim hæc, ut diximus, possessionem tuetur." Bynkershoek, de Dominio Maris, cap. 2. Ortolan, Diplomatie de la Mer, liv. 2, chap. viii.

different opinion, and determined that the protection of the territory was to be reckoned from these islands, and that they are the natural appendages of the coast on which they border, and from which, indeed, they were formed. Their elements were derived immediately from the territory; and, on the principle of alluvium and increment, on which so much is to be found in the books of law, *Quod vis fluminis de tuo prædio detraxerit, et vicino prædio attulerit, palam tuum remanet*, even if it had been carried over to an adjoining territory. Whether they were composed of earth or solid rock would not vary the right of dominion, for the right of dominion does not depend upon the texture of the soil.[1]

The King's Chambers.

The exclusive territorial jurisdiction of the British crown over the inclosed parts of the sea along the coasts of the island of Great Britain, has immemorially extended to those bays called the *King's Chambers;* that is, portions of the sea cut off by lines drawn from one promontory to another. A similar jurisdiction is also asserted by the United States over the Delaware Bay, and other bays and estuaries forming portions of their territory. It appears from Sir Leoline Jenkins, that both in the reigns of James I. and Charles II. the security of British commerce was provided for, by express prohibitions against the roving or hovering of foreign ships of war so near the neutral coasts and harbors of Great Britain as to disturb or threaten vessels homeward or outward bound; and that captures by such foreign cruisers, even of their enemies' vessels, would be restored by the Court of Admiralty, if made within the King's Chambers. So, also, the British "Hovering Act," passed in 1736, (9 Geo. II. cap. 35,) assumes, for certain revenue purposes, a jurisdiction of four leagues from the coasts, by prohibiting foreign goods to be transshipped within that distance, without payment of duties. A similar provision is contained in the revenue laws of the United States; and both these provisions have been declared, by judicial authority in each country, to be consistent with the law and usage of nations.[2]

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[1] Robinson's Adm. Rep. vol. v. p. 385, (c.) The Anna.

[2] Life and Works of Sir L. Jenkins, vol. ii. pp. 727, 728, 780. Opinion of the United States Attorney-General on the capture of the British ship Grange in the Delaware Bay, 1793. Waite's American State Papers, vol. i. p. 75. Dodson's

§ 8. Right of fishery.

The right of fishing in the waters adjacent to the coasts of any nation, within its territorial limits, belongs exclusively to the subjects of the State. The exercise of this right, between France and Great Britain, was regulated by a Convention concluded between these two powers, in 1839; by the 9th article of which it is provided, that French subjects shall enjoy the exclusive right of fishing along the whole extent of the coasts of France, within the distance of three geographical miles from the shore, at low-water mark, and that British subjects shall enjoy the same exclusive right along the whole extent of the coasts of the British Islands, within the same distance; it being understood, that upon that part of the coasts of France lying between Cape Carteret and the point of Monga, the exclusive right of French subjects shall only extend to the fishery within the limits mentioned in the first article of the Convention; it being also understood, that the distance of three miles, limiting the exclusive right of fishing upon the coasts of the two countries, shall be measured, in respect to bays of which the opening shall not exceed ten miles, by a straight line drawn from one cape to the other.[1]

By the 1st article of the Convention of 1818, between the United States and Great Britain, reciting, that "whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof to take, dry, and cure fish, on certain coasts, bays, harbors, and creeks, of his Britannic Majesty's dominions in America," it was agreed between the contracting parties, "that the inhabitants of the said United States shall have, forever, in common with the subjects of his Britannic Majesty, the liberty to take fish of every kind on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands; on the shores of the Magdalen Islands; and also on the coasts, bays, harbors, and creeks, from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belleisle, and

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Adm. Reports, vol. ii. p. 245. Le Louis. Cranch's Reports, vol. ii. p. 187. Church *v.* Hubbard. Vattel, Droits des Gens, liv. i. ch. 22, § 281.

[1] Annales Maritimes et Coloniales, 1839, 1re Partie, p. 861.

thence northwardly indefinitely along the coast; without prejudice, however, to any of the exclusive rights of the Hudson Bay Company. And that the American fishermen shall also have liberty, forever, to dry and cure fish in any of the unsettled bays, harbors, and creeks, of the southern part of the coast of Newfoundland, here above described, and of the coast of Labrador; but so soon as the same, or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without previous agreement for such purpose with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbors, of his Britannic Majesty's dominions in America, not included within the above-mentioned limits. Provided, however, that the American fishermen shall be admitted to enter such bays or harbors, for the purpose of shelter, and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."[1] (*a*)

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1 Elliot's Diplomatic Code, vol. i. p. 281.

(*a*) [The negotiations of 1818 were conducted by Messrs. Gallatin & Rush, on the part of the United States, and by Mr. Robinson, (afterwards Lord Goderich,) and Mr. Goulburn, on the part of Great Britain. An arrangement on the subject of impressment, on the basis heretofore referred to, (pp. 164–5, note,) of the exclusion of all natural born citizens or subjects of either power thereafter naturalized, from serving in the public or private marine of the other, was, as in the negotiations both previous and subsequent, made a subject of discussion; and we are informed by Mr. Rush, that a satisfactory adjustment only failed to be effected, because the British insisted on two points of detail. The one regarded as naturalized seamen, within the provision of the treaty, those only, whose names should be inserted in the lists, specifying the places of their birth and the dates of their naturalization, which each government was to furnish to the other, within twelve months after the ratification of the treaty, and the other made the exclusion, imposed by the treaty, apply to those seamen, who were naturalized after its date, and before its ratification. From the fact that, anterior to the adoption of the Federal constitution, the several States exercised the power of naturalization, and that the acts of Congress did not require, for several years, the birth-place of

§ 9. Claims to portions of the sea

Beside those bays, gulfs, straits, mouths of rivers, and estuaries which are inclosed by capes and head-

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the aliens, who were naturalized, to be recorded, and that minor children of naturalized persons, if within the limits of the Union, become *ipso facto* naturalized, it would have been impossible for us to make the necessary returns. Nor were the British satisfied with our proposition to throw the burden of proof of their naturalization on such seamen as might not be included in the lists. The other provision, however conformable to the rule in ordinary cases, was objected to as giving a retroactive operation to the treaty, with regard to such seamen as might be naturalized in the period intervening between its date and ratification. Mr. Rush expresses the confident opinion, which, from what is elsewhere stated, would seem likewise to have been that of Mr. Gallatin, that "had Lord Castlereagh, (who was then attending the Congress at Aix-la-Chapelle,) been in London, there would not have been a failure."

The point mainly discussed, as regards the fisheries, was, whether the recognition of the American right and liberty to fish on the Banks of Newfoundland and elsewhere, in the 3d article of the treaty of 1783, was of a permanent character, or liable, like the provisions of an ordinary treaty, to be abrogated by war. The British doctrine was, that the treaty of 1783 not being reënacted or confirmed by the treaty of Ghent, was annulled by the war of 1812. The United States, while they did not deny the general rule that a war put an end to previous treaties, insisted that that rule was not applicable to the treaty of 1783, which was a treaty of partition, and by which the rights of each party were laid down as primary and fundamental; so much of territory and incidental rights being allotted to the one and so much to the other. The entire instrument implied permanence, and hence all the fishing rights secured under it to the United States were placed upon the same foundation with their independence itself. This matter was finally adjusted on the basis of compromise, as embodied in the treaty cited in the text. Rush's Memoranda of a Residence at the Court of London, pp. 432, 439, 445, 390.

Discussions, as to the interpretation of the provisions respecting the fisheries, in the treaty of 1818, go back as far as 1823; and Mr. Forsyth, in instructing Mr. Stevenson, minister at London, February 20, 1841, states, as the point of difference, that the provincial authorities assume a right to exclude American vessels from all their bays, including the Bays of Fundy and Chaleurs, and to prohibit their approach within three miles of a line drawn from headland to headland, while the American fishermen believe that they have a right to take fish anywhere within three miles of land. Certain relaxations in the pretensions of England, with regard to the Bay of Fundy, were, in 1845, announced by Lord Aberdeen to Mr. Everett, minister at London; but the whole subject obtained renewed importance in 1852, on account of a British force being ordered to that coast, to protect the claims of the colonists, and a correspondence, involving the original merits of the controversy, was, during that year, carried on, at London and at Washington. See Cong. Doc. 32d Cong. 1st Sess. Senate, Ex. Doc. No. 100. Special Session, 1853, Senate Ex. Doc. No. 3.

A treaty was concluded at Washington, on 5th of June, 1854, by Mr. Marcy, Secretary of State, and the Earl of Elgin, then Governor-General of British North

lands belonging to the territory of the State, a jurisdiction and right of property over certain other portions of the sea have been claimed by different nations, on the upon the ground of prescription.

America, (and who acted as the British Plenipotentiary,) for the final adjustment of these questions, in connection with a trade between the United States and the adjacent Provinces, on the principles of reciprocity. The articles in relation to the fisheries are asfollows : —

Article I. It is agreed by the high contracting parties, that, in addition to the liberty secured to the United States' fishermen by the above-named Convention of 1818, of taking, curing, and drying fish on certain coasts of the British North American Colonies, therein defined, the inhabitants of the United States shall have, in common with the subjects of her Britannic Majesty, the liberty to take fish of every kind, except shell fish, on the seacoasts and shores, and in the bays, harbors, and creeks, of Canada, New Brunswick, Nova Scotia, Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore ; with permission to land upon the coasts and shores of those colonies, and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish ; provided that, in so doing, they do not interfere with the rights of private property, or with the British fishermen, in the peaceable use of any part of the said coast, in their occupancy for the same purpose. It is understood that the above-mentioned liberty applies solely to the sea fishery; and that the salmon and shad fisheries, and all fisheries in rivers and the mouths of rivers, are hereby reserved, exclusively, for British fishermen. And it is further agreed, that in order to prevent or settle any disputes, as to the places to which the reservation of exclusive right to British fishermen, contained in this article, and that of fishermen of the United States, contained in the next succeeding article, apply, each of the high contracting parties, on the application of either to the other, shall, within six months thereafter, appoint a commissioner.

The said commissioners, before proceeding to any business, shall make and subscribe a solemn declaration, that they will impartially and carefully decide, to the best of their judgment, and according to justice and equity, without fear, favor, or affection to their own country, upon all such places as are intended to be reserved and excluded from the common liberty of fishing, under this and the next succeeding article, and such declaration shall be entered on the record of their proceedings.

The commissioners shall name some third person, to act as arbitrator or umpire in any case or cases on which they may themselves differ in opinion. If they should not be able to agree upon the name of such person, they shall each name a person, and it shall be determined by lot which of the two persons so named shall be arbitrator or umpire, in cases of difference or disagreement between the commissioners.

The person so to be chosen to be arbitrator or umpire shall, before proceeding to act as such in any case, make and subscribe a solemn declaration, in a form similar to that which shall already have been made and subscribed by the commissioners, which shall be entered on the record of their proceedings.

ground of immemorial use. Such, for example, was the sovereignty formerly claimed by the Republic of Venice over the Adriatic. The maritime supremacy claimed by Great Britain over what are called the Narrow Seas has generally been asserted merely by requiring certain honors to the British flag in those seas, which have been rendered or refused by other nations, according to circumstances, but the claim itself has never been sanctioned by general acquiescence.[1]

Straits are passages communicating from one sea to another. If the navigation of the two seas thus connected is free, the navi-

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In the event of the death, absence, or incapacity of either of the commissioners or the arbitrator, or umpire, or of their or his omitting, declining, or ceasing to act as such commissioner, arbitrator, or umpire, another and different person shall be appointed or named, as aforesaid, to act as such commissioner, arbitrator, or umpire, in the place and stead of the person so originally appointed or named as aforesaid, and shall make and subscribe such declaration as aforesaid.

Such commissioners shall proceed to examine the coasts of the North American Provinces and of the United States, embraced within the provisions of the first and second articles of this treaty, and shall designate the places reserved by the said articles from the common right of fishing therein. The decision of the commissioners, and of the arbitrator or umpire, shall be given in writing in each case, and shall be signed by them respectively. The high contracting parties hereby solemnly engage to consider the decision of the commissioners conjointly, or of the arbitrator or umpire, as the case may be, as absolutely final and conclusive in each case decided upon by them or him respectively.

ART. 2. It is agreed by the high contracting parties, that British subjects shall have, in common with the citizens of the United States, the liberty to take fish of every kind, except shell fish, on the eastern sea-coasts and shores of the United States, north of the thirty-sixth parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbors, and creeks of the said sea-coast coasts and shores of the United States, and of the said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States, and of the islands aforesaid, for the purpose of drying their nets and curing their fish; provided that in so doing they do not interfere with the rights of private property, or with the fishermen of the United States, in the peaceable use of any part of the said coasts, in their occupancy for the same purpose.

It is understood that the above-mentioned liberty applies solely to the sea fishery, and that salmon and shad fisheries, and all fisheries in rivers and mouths of rivers, are hereby reserved exclusively for fishermen of the United States. Washington Union.]

[1] Vattel, Droit des Gens, liv. i. ch. 23, § 289. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. ii. ch. 1, § 42. Edinburgh Review, vol. xi. art. 1, pp. 17–19. Wheaton's Hist. Law of Nations, pp. 154–157. Klüber, § 132.

gation of the channel by which they are connected ought also to be free. Even if such strait be bounded on both sides by the territory of the same sovereign, and is at the same time so narrow as to be commanded by cannon shot from both shores, the exclusive territorial jurisdiction of that sovereign over such strait is controlled by the right of other nations to communicate with the seas thus connected. Such right may, however, be modified by special compact, adopting those regulations which are indispensably necessary to the security of the State whose interior waters thus form the channel of communication between different seas, the navigation of which is free to other nations. Thus the passage of the strait may remain free to the private merchant vessels of those nations having a right to navigate the seas it connects, whilst it is shut to all foreign armed ships in time of peace.

The Black Sea, the Bosphorus, and the Dardanelles.

So long as the shores of the Black Sea were exclusively possessed by Turkey, that sea might with propriety be considered a *mare clausum;* and there seems no reason to question the right of the Ottoman Porte to exclude other nations from navigating the passage which connects it with the Mediterranean, both shores of this passage being at the same time portions of the Turkish territory; but since the territorial acquisitions made by Russia, and the commercial establishments formed by her on the shores of the Euxine, both that empire and the other maritime powers have become entitled to participate in the commerce of the Black Sea, and consequently to the free navigation of the Dardanelles and the Bosphorus. This right was expressly recognized by the seventh article of the treaty of Adrianople, concluded in 1829, between Russia and the Porte, both as to Russian vessels and those of other European States in amity with Turkey.[1] (*a*)

The right of foreign vessels to navigate the interior waters of

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[1] Martens, Nouveau Recueil, tom. viii. p. 143.

(*a*) [The 7th article of the treaty of 1830, between the United States and the Ottoman Porte provides that merchant vessels of the United States, in like manner as vessels of the most favored nations, shall have liberty to pass the Canal of the Imperial Residence, and go and come in the Black Sea, either laden or in ballast: and they may be laden with the produce, manufactures, and effects of the Ottoman Empire, excepting such as are prohibited, as well as of their own country. U. S. Statutes at Large, vol. viii. p. 409.]

Turkey, which connect the Black Sea with the Mediterranean, does not extend to ships of war. The ancient rule of the Ottoman Empire, established for its own security, by which the entry of foreign vessels of war into the canal of Constantinople, including the strait of the Dardanelles and that of the Black Sea, has been at all times prohibited, was expressly recognized by the treaty concluded at London the 13th July, 1841, between the five great European powers and the Ottoman Porte.

By the 1st article of this treaty, the Sultan declared his firm resolution to maintain, in future, the principle invariably established as the ancient rule of his empire; and that so long as the Porte should be at peace, he would admit no foreign vessel of war into the said straits. The five powers, on the other hand, engaged to respect this determination of the Sultan, and to conform to the above-mentioned principle.

By the 2d article it was provided, that, in declaring the inviolability of this ancient rule of the Ottoman Empire, the Sultan reserved the faculty of granting, as heretofore, firmans allowing the passage to light armed vessels employed according to usage, in the service of the diplomatic legations of friendly powers.

By the 3d article, the Sultan also reserved the faculty of notifying this treaty to all the powers in amity with the Sublime Porte, and of inviting them to accede to it.[1]

Danish sovereignty over the Sound and the Belts.

The supremacy asserted by the King of Denmark over the Sound and the two Belts which form the outlet of the Baltic Sea into the ocean, is rested by the Danish public jurists upon immemorial prescription, sanctioned by a long succession of treaties with other powers. According to these writers, the Danish claim of sovereignty has been exercised from the earliest times beneficially for the protection of commerce against pirates and other enemies by means of guard-ships, and against the perils of the sea by the establishment of lights and land-marks. The Danes continued for several centuries masters of the coasts on both sides of the Sound, the province of Scania not having been ceded to Sweden until the treaty of Roeskild, in 1658, confirmed by that of 1660, in which it was stipulated that Sweden should never lay claim to the

[1] Wheaton's Hist. Law of Nations, pp. 583–585.

Sound tolls in consequence of the cession, but should content herself with a compensation for keeping up the light-houses on the coast of Scania. The exclusive right of Denmark was recognized as early as 1368, by a treaty with the Hanseatic republics, and by that of 1490, with Henry VII. of England, which forbids English vessels from passing the Great Belt as well as the Sound, unless in case of unavoidable necessity; in which case they were to pay the same duties at Wyborg as if they had passed the Sound at Elsinore. The treaty concluded at Spire, in 1544, with the Emperor Charles V., which has commonly been referred to as the origin, or at least the first recognition, of the Danish claim to the Sound tolls, merely stipulates, in general terms, that the merchants of the Low Countries frequenting the ports of Denmark should pay the same duties as formerly.

The treaty concluded at Christianople, in 1645, between Denmark and the United Provinces of the Netherlands, is the earliest convention with any foreign power by which the amount of duties to be levied on the passage of the Sound and Belts was definitely ascertained. A tariff of specific duties on certain articles therein enumerated was annexed to this treaty, and it was stipulated that "goods not mentioned in the list should pay, according to mercantile usage, and what has been practised from ancient times."

A treaty was concluded between the two countries at Copenhagen, in 1701, by which the obscurity in that of Christianople as to the non-specified articles, was meant to be cleared up. By the third article of the new treaty it was declared, that as to the goods not specified in the former treaty, "the Sound duties are to be paid *according to their value;* that is, they are to be valued *according to the place from whence they come*, and one per centum of their value to be paid.

These two treaties of 1645 and 1701, are constantly referred to in all subsequent treaties, as furnishing the standard by which the rates of these duties are to be measured as to *privileged* nations. Those *not privileged*, pay according to a more ancient tariff for the specified articles, and one and a quarter per centum on unspecified articles.[1]

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[1] Schlegel, Staats-Recht des Königreich Dänemark, 1 Th. kap. 7, §§ 27–29. Wheaton, Hist. Law of Nations, pp. 158–161.

Convention of 1841.

By the arrangement concluded at London and Elsinore, in 1841, between Denmark and Great Britain, the tariff of duties levied on the passage of the Sound and Belts was revised, the duties on non-enumerated articles were made specific, and others reduced in amount, whilst some of the abuses which had crept into the manner of levying the duties in general were corrected. The benefit of this arrangement, which is to subsist for the term of ten years, has been extended to all other nations *privileged* by treaty.[1] (*a*)

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[1] Scherer, der Sundzoll, seine Geschichte, sein jetziger Bestand und seine Staatsrechtlich — politische Lösung, Beilage Nr. 8–9.

(*a*) [For a further view of the treaties on this subject, see the *Histoire des Progrès du Droit des Gens*, by Mr. Wheaton, Leipzig edition, 1846, tom. i. p. 211. Mr. Wheaton, during his mission to Denmark, from 1827 to 1835, called the attention of his government to the Sound duties, with a view to the relief of American navigation, though as there was an implied recognition of them by the Treaty of 1826, which could not be terminated before 1836, nothing could be done respecting them, during his residence at Copenhagen. While at Berlin, he examined this question more fully, as well as what related to the analogous subject of the duties levied by the Hanoverian government at Stade, on the goods of all nations passing up the Elbe, except those of Hamburgh.

The Sound duties at Elsinore have, especially since the report of Mr. Webster, of May 24, 1841, and which was compiled from the despatches of Mr. Wheaton, received the particular consideration of the Department of State. Mr. Buchanan, in instructing, October 14th, 1848, Mr. Flenniken, Chargé d'Affaires at Copenhagen, tells him that, "under the public law of nations, it cannot be pretended that Denmark has any right to levy duties on vessels passing through the Sound from the North Sea to the Baltic;" for which he cites as authority the language of this work, in reference to Straits, connecting two seas. He, however, authorized him to offer the Danish government, for the perpetual renunciation of these duties, $250,000, in addition to the continuance of the commercial convention, and which places their navigation in the ports of the United States, as regards all foreign trade, circuitous as well as direct, on an equality with the merchant marine of the country. It was in return for the same concession in the treaty, concluded by Mr. Mann, in 1846, with Hanover, that it was stipulated that no higher or other toll should be collected at Stade upon the tonnage and cargoes of vessels of the United States than is collected upon the tonnage and cargoes of Hanoverian vessels. On the accession of President Pierce, in 1853, instructions were given to the Chargé d'Affaires, commissioned to Copenhagen, to press the matter of the Sound duties to a conclusion; and in reply to his inquiry, whether he might offer to Denmark any thing, either in the form of additional commercial advantages or otherwise, as an equivalent for them, he was informed by Secretary Marcy, that the President declined authorizing him to offer to that power any compensation for the removal of that as a favor, which we had demanded as a right.

The Baltic Sea is considered by the maritime powers bordering on its coasts as *mare clausum* against the exercise of hostilities upon its waters by other States, whilst the Baltic powers are at peace. This principle was proclaimed in the treaties of armed neutrality in 1780 and 1800, and by the treaty of 1794, between Denmark and Sweden, guaranteeing the tranquillity of that sea. In the Russian declaration of war against Great Britain of 1807, the inviolability of that sea and the reciprocal guarantees of the powers that border upon it (guarantees said to have been contracted with the knowledge of the British government) were stated as aggravations of the British proceedings in entering the Sound and attacking the Danish capital in that year. In the British answer to this declaration it was denied that Great Britain had at any time acquiesced in the principles upon which the inviolability of the Baltic is maintained; however she might, at particular periods, have forborne, for special reasons influencing her conduct at the time, to act in contradiction to them. Such forbearance never could have applied but to a state of peace and real neutrality in the north; and she could not be expected to recur to it after France had been suffered, by the conquest of Prussia, to establish herself in full sovereignty along the whole coast, from Dantzic to Lubeck.[1]

Qu. Whether the Baltic Sea is *mare clausum*?

The controversy, how far the open sea or main ocean, beyond the immediate vicinity of the coasts, may be appropriated by one nation to the exclusion of others, which once exercised the pens of the ablest and most

§ 10. Controversy respecting the dominion of the seas.

The President, in his Annual Message of 1854, says that it is admitted that these tolls are sanctioned not by the general principles of the law of nations, but only by special conventions. He proposes to terminate the Treaty of 1826, from which, as providing that no higher duties on our vessels and cargoes, passing the Sound, should be paid than on those of the most favored nations, an agreement to submit to the exaction might be implied. See Wheaton's MS. Despatches from Copenhagen, April 9, 1830; February 20, 1833; and from Berlin, December 30, 1835; February 14, 1838; March 10, 1841; September 8, 1841; February 25, 1843; June 30, 1844; February 15, 1845; January 21, 1846. Webster's Works, vol. vi. p. 406. U. S. Statutes at Large, vol. ix. p. 858. Cong. Doc. H. of Rep. 33d Congress, 1st Sess. Ex. Doc. 108. President's Message, December, 1854.]

[1] Annual Register, vol. xlix. State Papers, p. 773.

learned European jurists, can hardly be considered open at this day. Grotius, in his treatise on the Law of Peace and War, hardly admits more than the possibility of appropriating the waters immediately contiguous, though he adduces a number of quotations from ancient authors, showing that a broader pretension has been sometimes sanctioned by usage and opinion. But he never intimates that any thing more than a limited portion could be thus claimed; and he uniformly speaks of "*pars*," or "*portus maris*," always confining his view to the effect of the neighboring land in giving a jurisdiction and property of this sort.[1] He had previously taken the lead in maintaining the common right of mankind to the free navigation, commerce, and fisheries of the Atlantic and Pacific Oceans, against the exclusive claims of Spain and Portugal, founded on the right of previous discovery, confirmed by possession and the papal grants. The treatise De Mare Libero was published in 1609. The claim of sovereignty asserted by the kings of England over the British seas was supported by Albericus Gentilis in his Advocatio Hispanica in 1613. In 1635, Selden published his Mare Clausum, in which the general principles maintained by Grotius are called in question, and the claim of England more fully vindicated than by Gentilis. The first book of Selden's celebrated treatise is devoted to the proposition that the sea may be made property, which he attempts to show, not by reasoning, but by collecting a multitude of quotations from ancient authors, in the style of Grotius, but with much less selection. He nowhere grapples with the arguments by which such a vague and extensive dominion is shown to be repugnant to the law of nations. And in the second part, which indeed is the main object of his work, he has recourse only to proofs of usage and of positive compact, in order to show that Great Britain is entitled to the sovereignty of what are called the Narrow Seas. Father Paul Sarpi, the celebrated historian of the Council of Trent, also wrote a vindication of the claim of the Republic of Venice to the sovereignty of the Adriatic.[2] Bynkershoek examined the general question, in the earliest of his published works, with the vigor and acumen

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[1] De Jur. Bel. ac Pac. lib. ii. cap. 3, §§ 8–13.

[2] Paolo Sarpi, Del Dominio del Mare Adriatico e sui Reggioni per il *Jus Belli* della Serenissima Rep. di Venezia, *Venet.* 1676, 12°.

which distinguish all his writings. He admits that certain portions of the sea may be susceptible of exclusive dominion, though he denies the claim of the English crown to the British seas on the ground of the want of uninterrupted possession. He asserts that there was no instance, at the time when he wrote, in which the sea was subject to any particular sovereign, where the surrounding territory did not also belong to him.[1] Puffendorf lays it down, that in a narrow sea the dominion belongs to the sovereigns of the surrounding land, and is distributed, where there are several such sovereigns, according to the rules applicable to neighboring proprietors on a lake or river, supposing no compact has been made, "as is pretended," he says, "by Great Britain;" but he expresses himself with a sort of indignation at the idea that the main ocean can ever be appropriated.[2] The authority of Vattel would be full and explicit to the same purpose, were it not weakened by the concession, that though the exclusive right of navigation or fishery in the sea cannot be claimed by one nation on the ground of immemorial use, nor lost to others by non-user, on the principle of prescription, yet it may be thus established where the non-user assumes the nature of a consent or tacit agreement, and thus becomes a title in favor of one nation against another.[3]

On reviewing this celebrated controversy it may be affirmed,

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[1] De Dominio Maris, Opera Minora, Dissert. V., first published in 1702.

"Nihil addo, quàm sententiæ nostræ hanc conjectionem: Oceanus, quà patet, totus imperio subjici non potest; pars potest, possunt et maria mediterranea, quotquot sunt, omnia. Nullum tamen mare mediterraneum, neque ulla pars Oceani ditione alicujus Principis tenetur, nisi quà in continentis sit imperio. Pronunciamus MARE LIBERUM, quod non possidetur vel universum possideri nequit, CLAUSUM, quod post justam occupationem navi unâ pluribusve olim possessum fuit, et, si est in fatis, possidebitur posthac, nullum equidem nunc agnoscimus subditum, cùm non sufficiat id affectasse, quin vel aliquando occupasse et possedisse, nisi etiamnum duret possessio, quæ gentium hodie est nullibi; ita libertatem et imperium, quæ haud facile miscentur, unâ sede locamus." Ib. cap. vii. ad finem.

[2] De Jure Naturæ et Gentium, lib. iv. cap. 5, § 7.

[3] Droit des Gens, liv. i. ch. 23, §§ 279–286.

As to the maritime police which may be exercised by any particular nation, on the high seas, for the punishment of offences committed on board its own vessels, or the suppression of piracy and the African slave trade, vide supra, Pt. ii. ch. ii. §§ 10, 15, pp. 158, 184.

that if those public jurists who have asserted the exclusive right of property in any particular nation over portions of the sea, have failed in assigning sufficient grounds for such a claim, so also the arguments alleged by their opponents for the contrary opinion must often appear vague, futile, and inconclusive. There are only two decisive reasons applicable to the question. The first is physical and material, which alone would be sufficient; but when coupled with the second reason, which is purely moral, will be found conclusive of the whole controversy.

I. Those things which are originally the common property of all mankind, can only become the exclusive property of a particular individual or society of men, by means of possession. In order to establish the claim of a particular nation to a right of property in the sea, that nation must obtain and keep possession of it, which is impossible.

II. In the second place, the sea is an element which belongs equally to all men like the air. No nation, then, has the right to appropriate it, even though it might be physically possible to do so.

It is thus demonstrated, that the sea cannot become the exclusive property of any nation. And, consequently, the use of the sea, for these purposes, remains open and common to all mankind.[1]

We have already seen that, by the generally approved usage of nations, which forms the basis of international law, the maritime territory of every State extends:

1st. To the ports, harbors, bays, mouths of rivers, and adjacent parts of the sea inclosed by headlands, belonging to the same State.

2dly. To the distance of a marine league, or as far as a cannon-shot will reach from the shore, along all the coasts of the State.

3dly. To the straits and sounds, bounded on both sides of the territory of the same State, so narrow as to be commanded by cannon-shot from both shores, and communicating from one sea to another.[2]

The reasons which forbid the assertion of an exclusive pro-

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[1] Ortolan, Regles Internationales et Diplomatie de la Mer, tom. i. pp. 120–126.

[2] Vide supra, §§ 6–9.

prietary right to the sea in general, will be found inapplicable to the particular portions of that element included in the above designations.

1. Thus, in respect to those portions of the sea which form the ports, harbors, bays, and mouths of rivers of any State where the tide ebbs and flows, its exclusive right of property, as well as sovereignty, in these waters, may well be maintained, consistently with both the reasons above mentioned, as applicable to the sea in general. The State possessing the adjacent territory, by which these waters are partially surrounded and inclosed, has that physical power of constantly acting upon them, and, at the same time, of excluding, at its pleasure, the action of any other State or person, which, as we have already seen, constitutes possession. These waters cannot be considered as having been intended by the Creator for the common use of all mankind, any more than the adjacent land, which has already been appropriated by a particular people. Neither the material nor the moral obstacle, to the exercise of the exclusive rights of property and dominion, exists in this case. Consequently, the State, within whose territorial limits these waters are included, has the right of excluding every other nation from their use. The exercise of this right may be modified by compact, express or implied; but its existence is founded upon the mutual independence of nations, which entitles every State to judge for itself as to the manner in which the right is to be exercised, subject to the equal reciprocal rights of all other States to establish similar regulations, in respect to their own waters.[1]

2. It may, perhaps, be thought that these considerations do not apply, with the same force, to those portions of the sea which wash the coasts of any particular State, within the distance of a marine league, or as far as a cannon-shot will reach from the shore. The physical power of exercising an exclusive property and jurisdiction, and of excluding the action of other nations within these limits, exists to a certain degree; but the moral power may, perhaps, seem to extend no further than to exclude the action of other nations to the injury of the State by which this right is claimed. It is upon this ground that is founded the acknowledged immunity of a neutral State from

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[1] Vide supra, Pt. II. ch. 2, § 9, p. 144.

the exercise of acts of hostility, by one belligerent power against another, within those limits. This claim has, however, been sometimes extended to exclude other nations from the innocent use of the waters washing the shores of a particular State, in peace and in war; as, for example, for the purpose of participating in the fishery, which is generally appropriated to the subjects of the State within that distance of the coasts. This exclusive claim is sanctioned both by usage and convention, and must be considered as forming a part of the positive law of nations.[1]

3. As to straits and sounds, bounded on both sides by the territory of the same State, so narrow as to be commanded by cannon-shot from both shores, and communicating from one sea to another, we have already seen that the territorial sovereignty may be limited, by the right of other nations to navigate the seas thus connected. The physical power which the State, bordering on both sides the sound or strait, has of appropriating its waters, and of excluding other nations from their use, is here encountered by the moral obstacle arising from the right of other nations to communicate with each other. If the Straits of Gibraltar, for example, were bounded on both sides by the possessions of the same nation, and if they were sufficiently narrow to be commanded by cannon-shot from both shores, this passage would not be the less freely open to all nations; since the navigation, both of the Atlantic Ocean and the Mediterranean Sea, is free to all. Thus it has already been stated that the navigation of the Dardanelles and the Bosphorus, by which the Mediterranean and Black Seas are connected together, is free to all nations, subject to those regulations which are indispensably necessary for the security of the Ottoman Empire. In the negotiations which preceded the signature of the treaty of intervention, of the 15th of July, 1840, it was proposed, on the part of Russia, that an article should be inserted in the treaty, recognizing the permanent rule of the Ottoman Empire; that, whilst that empire is at peace, the Straits, both of the Bosphorus and the Darda-

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[1] Martens, Précis du Droit des Gens Moderne de l'Europe, § 153. "Mais si, loin de s'en emparer, il a une fois reconnu le droit commun des autres peuples d'y venir pêcher, il ne peut plus les en exclure; il a laissé cette pêche dans sa communion primitive, au moins à l'égard de ceux qui sont en possession d'en profiter." Vattel, Droit des Gens, liv. i. c. 23, § 287.

nelles, are considered as shut against the ships of war of all nations. To this proposition it was replied, on the part of the British government, that its opinion respecting the navigation of these Straits by the ships of war of foreign nations rested upon a general and fundamental principle of international law. Every State is considered as having territorial jurisdiction over the sea which washes its shores, as far as three miles from low-water mark; and, consequently, any strait which is bounded on both sides by the territory of the same sovereign, and which is not more than six miles wide, lies within the territorial jurisdiction of that sovereign. But the Bosphorus and Dardanelles are bounded on both sides by the territory of the Sultan, and are in most parts less than six miles wide; consequently his territorial jurisdiction extends over both those Straits, and he has a right to exclude all foreign ships of war from those Straits, if he should think proper so to do. By the Treaty of 1809, Great Britain acknowledged this right on the part of the Sultan, and promised to acquiesce in the enforcement of it; and it was but just that Russia should take the same engagement. The British government was of opinion, that the exclusion of all foreign ships of war from the two Straits would be more conducive to the maintenance of peace, than an understanding that the Strait in question should be a general thoroughfare, open, at all times, to ships of war of all countries; but whilst it was willing to acknowledge by treaty, as a general principle and as a standing rule, that the two Straits should be closed for all ships of war, it was of opinion, that if, for a particular emergency, one of those Straits should be open for one party, the other ought, at the same time, to be open for other parties, in order that there should be the same parity between the condition of the two Straits, when open and shut; and, therefore, the British government would expect that, in that part of the proposed Convention which should allot to each power its appropriate share of the measures of execution, it should be stipulated, that if it should become necessary for a Russian force to enter the Bosphorus, a British force should, at the same time, enter the Dardanelles.

It was accordingly declared, in the 4th article of the Convention, that the coöperation destined to place the Straits of the Dardanelles and the Bosphorus and the Ottoman capital under the temporary safeguard of the contracting parties, against all

aggression of Mehemet Ali, should be considered only as a measure of exception, adopted at the express request of the Sultan, and solely for his defence, in the single case above mentioned; but it was agreed that such measure should not derogate, in any degree, from the ancient rule of the Ottoman Empire, in virtue of which it had, at all times, been prohibited for ships of war of foreign powers to enter those Straits. And the Sultan, on the one hand, declared that, excepting the contingency above mentioned, it was his firm resolution to maintain, in future, this principle invariably established as the ancient rule of his Empire, and, so long as the Porte should be at peace, to admit no foreign ship of war into these Straits; on the other hand, the four powers engaged to respect this determination, and to conform to the above-mentioned principle.

This rule, and the engagement to respect it, as we have already seen, were subsequently incorporated into the Treaty of the 13th July, 1841, between the five great European powers and the Ottoman Porte; and as the right of the private merchant vessels of all nations, in amity with the Porte, to navigate the interior waters of the Empire, which connect the Mediterranean and Black Seas, was recognized by the Treaty of Adrianople, in 1829, between Russia and the Porte; the two principles — the one excluding foreign ships of war, and the other admitting foreign merchant vessels to navigate those waters — may be considered as permanently incorporated into the public law of Europe.[1]

§ 11. Rivers forming part of the territory of the State.

The territory of the State includes the lakes, seas, and rivers, entirely inclosed within its limits. The rivers which flow through the territory also form a part of the domain, from their sources to their mouths, or as far as they flow within the territory, including the bays or estuaries formed by their junction with the sea. Where a navigable river forms the boundary of conterminous States, the middle of the channel, or *Thalweg*, is generally taken as the line of separation between the two States, the presumption of law being that the right of navigation is common to both; but this presumption may be destroyed by actual proof of prior occupancy and long

[1] Wheaton, Hist. Law of Nations, pp. 577–583.

undisturbed possession, giving to one of the riparian proprietors the exclusive title to the entire river.[1]

§ 12. Right of innocent passage on rivers flowing through different States.

Things of which the use is inexhaustible, such as the sea and running water, cannot be so appropriated as to exclude others from using these elements in any manner which does not occasion a loss or inconvenience to the proprietor. This is what is called an *innocent use*. Thus we have seen that the jurisdiction possessed by one nation over sounds, straits, and other arms of the sea, leading through its own territory to that of another, or to other seas common to all nations, does not exclude others from the right of innocent passage through these communications. The same principle is applicable to rivers flowing from one State through the territory of another into the sea, or into the territory of a third State. The right of navigating, for commercial purposes, a river which flows through the territories of different States, is common to all the nations inhabiting the different parts of its banks; but this right of innocent passage being what the text-writers call an *imperfect right*, its exercise is necessarily modified by the safety and convenience of the State affected by it, and can only be effectually secured by mutual convention regulating the mode of its exercise.[2]

§ 13. Incidental right to use the banks of the rivers.

It seems that this right draws after it the incidental right of using all the means which are necessary to the secure enjoyment of the principal right itself. Thus the Roman law, which considered navigable rivers as public or common property, declared that the right to the use of the shores was incident to that of the water; and that the right to navigate a river involved the right to moor vessels to its banks, to lade and unlade cargoes, &c. The public jurists apply this

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[1] Vattel, Droits des Gens, liv. i. ch. 22, § 266. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. ii. ch. 1, § 39. Heffter, das Europäische Völkerrecht, §§ 66–77.

[2] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 2, §§ 12–14; cap. 3, §§ 7–12. Vattel, Droit des Gens, liv. ii. ch. 9, §§ 126–130; ch. 10, §§ 132–134. Puffendorf, de Jur. Naturæ et Gentium, lib. iii. cap. 3, §§ 3–6.

principle of the Roman civil law to the same case between nations, and infer the right to use the adjacent land for these purposes, as means necessary to the attainment of the end for which the free navigation of the water is permitted.[1]

§ 14. These rights *imperfect* in their nature.

The incidental right, like the principal right itself, is imperfect in its nature, and the mutual convenience of both parties must be consulted in its exercise.

§ 15. Modification of these rights by compact.

Those who are interested in the enjoyment of these rights may renounce them entirely, or consent to modify them in such manner as mutual convenience and policy may dictate. A remarkable instance of such a renunciation is found in the treaty of Westphalia, 1648, confirmed by subsequent treaties, by which the navigation of the river Scheldt was closed to the Belgic provinces, in favor of the Dutch. The forcible opening of this navigation by the French on the occupation of Belgium by the arms of the French Republic, in 1792, in violation of these treaties, was one of the principal ostensible causes of the war between France on one side, and Great Britain and Holland on the other. By the treaties of Vienna, the Belgic provinces were united to Holland under the same sovereign, and the navigation of the Scheldt was placed on the same footing of freedom with that of the Rhine and other great European rivers. And by the treaty of 1831, for the separation of Holland from Belgium, the free navigation of the Scheldt was, in like manner, secured, subject to certain duties, to be collected by the Dutch government.[2]

§ 16. Treaties of Vienna respecting the great European rivers.

By the treaty of Vienna, in 1815, the commercial navigation of rivers, which separate different States, or flow through their respective territories, was declared to be entirely free in their whole course, from the point where each river becomes navigable to its mouth; provided that the regulations relating to the police of the navigation should be

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[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 2, § 15. Puffendorf, de Jur. Naturæ et Gentium, lib. iii. cap. 3, § 8. Vattel, Droit des Gens, liv. ii. ch. 9, § 129.

[2] Wheaton, Hist. Law of Nations, pp. 282–284, 552.

observed, which regulations were to be uniform, and as favorable as possible to the commerce of all nations.[1]

By the *Annexe* xvi. to the final act of the Congress of Vienna, the free navigation of the Rhine is confirmed "in its whole course, from the point where it becomes navigable to the sea, ascending or descending;" and detailed regulations are provided respecting the navigation of that river, and the Neckar, the Mayn, the Moselle, the Meuse, and the Scheldt, which are declared in like manner to be free from the point where each of these rivers becomes navigable to its mouth. Similar regulations respecting the free navigation of the Elbe were established among the powers interested in the commerce of that river, by an act signed at Dresden the 12th December, 1821. And the stipulations between the different powers interested in the free navigation of the Vistula and other rivers of ancient Poland, contained in the treaty of the 3d May, 1815, between Austria and Russia, and of the same date between Russia and Prussia, to which last Austria subsequently acceded, are confirmed by the final act of the Congress of Vienna. The same treaty also extends the general principles adopted by the Congress relating to the navigation of rivers to that of the Po.[2]

§ 17. Navigation of the Rhine.

The interpretation of the above stipulations respecting the free navigation of the Rhine, gave rise to a controversy between the kingdom of the Netherlands and the other States interested in the commerce of that river. The Dutch government claimed the exclusive right of regulating and imposing duties upon the trade, within its own territory, at the places where the different branches into which the Rhine divides itself fall into the sea. The expression in the treaties of Paris and Vienna "*jusqu' à la mer*," to the sea, was said to be different in its import from the term "*dans la mer*," into the sea: and, besides, it was added, if the upper States insist so strictly upon the terms of the treaties, they must be contented with the course of the proper Rhine itself. The mass of waters brought down by

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[1] Wheaton's Hist. Law of Nations, pp. 498–501.

[2] Mayer, Corpus Juris Germanici, tom. ii. pp. 224–239, 298. Acte Final, art. 14, 118, 96.

that river, dividing itself a short distance above Nimiguen, is carried to the sea through three principal channels, the Waal, the Leck, and the Yssel; the first descending by Gorcum, where it changes its name for that of the Meuse; the second approaching the sea at Rotterdam; and the third, taking a northerly course by Zutphen and Deventer, empties itself into Zuyderzee. None of these channels, however, is called the Rhine; that name is preserved to a small stream which leaves the Leck at Wyck, takes its course by the learned retreats of Utrecht and Leyden, gradually dispersing and losing its waters among the sandy downs at Kulwyck. The proper Rhine being thus useless for the purposes of navigation, the Leck was substituted for it by common consent of the powers interested in the question; and the government of the Netherlands afterwards consented that the Waal, as being better adapted to the purposes of navigation, should be substituted for the Leck. But it was insisted by that government that the Waal terminates at Gorcum, to which the tide ascends, and where, consequently, the Rhine terminates; all that remains of that branch of the river from Gorcum to Helvoetsluys and the mouth of the Meuse is an arm of the sea, inclosed within the territory of the kingdom, and consequently subject to any regulations which its government may think fit to establish.

On the other side, it was contended by the powers interested in the navigation of the river, that the stipulations in the treaty of Paris, in 1814, by which the sovereignty of the House of Orange over Holland was revived, with an accession of territory, and the navigation of the Rhine was, at the same time, declared to be free "from the point where it becomes navigable to the sea," were inseparably connected in the intentions of the allied powers who were parties to the treaty. The intentions thus disclosed were afterwards carried into effect by the Congress of Vienna, which determined the union of Belgium to Holland, and confirmed the freedom of the navigation of the Rhine, as a condition annexed to this augmentation of territory which had been accepted by the government of the Netherlands. The right to the free navigation of the river, it was said, draws after it, by necessary implication, the innocent use of the different waters which unite it with the sea; and the expression "to the sea" was, in this respect, equivalent to the term "into the sea," since

the pretension of the Netherlands to levy unlimited duties upon its principal passage into the sea would render wholly useless to other States the privilege of navigating the river within the Dutch territory.[1]

After a long and tedious negotiation, this question was finally settled by the convention concluded at Mayence, the 31st of March, 1831, between all the riparian States of the Rhine, by which the navigation of the river was declared free from the point where it becomes navigable into the sea, (*bis in die See*,) including its two principal outlets or mouths in the kingdom of the Netherlands, the Leck and the Waal, passing by Rotterdam and Briel through the first-named watercourse, and by Dordrecht and Helvoetsluys through the latter, with the use of the artificial communication by the canal of Voorne with Helvoetsluys. By the terms of this treaty the government of the Netherlands stipulates, in case the passages by the main sea by Briel or Helvoetsluys should at any time become innavigable, through natural or artificial causes, to indicate other watercourses for the navigation and commerce of the riparian States, equal in convenience to those which may be open to the navigation and commerce of its own subjects. The convention also provides minute regulations of police and fixed toll-duties on vessels and merchandise passing through the Netherlands territory to or from the sea, and also by the different ports of the upper riparian States on the Rhine.[2]

§ 18. Navigation of the Mississippi.

By the treaty of peace concluded at Paris in 1763, between France, Spain, and Great Britain, the province of Canada was ceded to Great Britain by France, and that of Florida to the same power by Spain, and the boundary between the French and British possessions in North America, was ascertained by a line drawn through the middle of the river Mississippi from its source to the Iberville, and from thence through the latter river and the lakes of Maurepas and Pontchartrain to the sea. The right of navigating the Mississippi was at the same time secured to the subjects of Great Britain from its source to

[1] Annual Register for 1826, vol. lxviii. p. 259–363.

[2] Martens, Nouveau Recueil, tom. ix. p. 252.

the sea, and the passages in and out of its mouth, without being stopped, or visited, or subjected to the payment of any duty whatsoever. The province of Louisiana was soon afterwards ceded by France to Spain; and by the treaty of Paris, 1783, Florida was retroceded to Spain by Great Britain. The independence of the United States was acknowledged, and the right of navigating the Mississippi was secured to the citizens of the United States and the subjects of Great Britain by the separate treaty between these powers. But Spain having become thus possessed of both banks of the Mississippi at its mouth, and a considerable distance above its mouth, claimed its exclusive navigation below the point where the southern boundary of the United States struck the river. This claim was resisted, and the right to participate in the navigation of the river from its source to the sea was insisted on by the United States, under the treaties of 1763 and 1783, as well as by the law of nature and nations. The dispute was terminated by the treaty of San Lorenzo el Real, in 1795, by the 4th article of which his Catholic Majesty agreed that the navigation of the Mississippi, in its whole breadth, from its source to the ocean, should be free to the citizens of the United States: and by the 22d article, they were permitted to deposit their goods at the port of New Orleans, and to export them from thence, without paying any other duty than the hire of the warehouses. The subsequent acquisition of Louisiana and Florida by the United States having included within their territory the whole river from its source to the Gulf of Mexico, and the stipulation in the treaty of 1783, securing to British subjects a right to participate in its navigation, not having been renewed by the treaty of Ghent in 1814, the right of navigating the Mississippi is now vested exclusively in the United States.

The right of the United States to participate with Spain in the navigation of the river Mississippi, was rested by the American government on the sentiment written in deep characters on the heart of man, that the ocean is free to all men, and its rivers to all their inhabitants. This natural right was found to be universally acknowledged and protected in all tracts of country, united under the same political society, by laying the navigable rivers open to all their inhabitants. When these rivers enter the limits of another society, if the right of the upper inhabitants to

descend the stream was in any case obstructed, it was an act of force by a stronger society against a weaker, condemned by the judgment of mankind. The, then, recent case of the attempt of the Emperor Joseph II. to open the navigation of the Scheldt from Antwerp to the sea, was considered as a striking proof of the general union of sentiment on this point, as it was believed that Amsterdam had scarcely an advocate out of Holland, and even there her pretensions were advocated on the ground of treaties, and not of natural right. This sentiment of right in favor of the upper inhabitants, must become stronger in the proportion which their extent of country bears to the lower. The United States held 600,000 square miles of inhabitable territory on the Mississippi and its branches, and this river, with its branches, afforded many thousands of miles of navigable waters penetrating this territory in all its parts. The inhabitable territory of Spain below their boundary and bordering on the river, which alone could pretend any fear of being incommoded by their use of the river, was not the thousandth part of that extent. This vast portion of the territory of the United States had no other outlet for its productions, and these productions were of the bulkiest kind. And, in truth, their passage down the river might not only be innocent, as to the Spanish subjects on the river, but would not fail to enrich them far beyond their actual condition. The real interests, then, of the inhabitants, upper and lower, concurred in fact with their respective rights.

If the appeal was to the law of nature and nations, as expressed by writers on the subject, it was agreed by them, that even if the river, where it passes between Florida and Louisiana, were the exclusive right of Spain, still an innocent passage along it was a natural right in those inhabiting its borders above. It would, indeed, be what those writers call an *imperfect* right, because the modification of its exercise depends, in a considerable degree, on the convenience of the nation through which they were to pass. But it was still a *right*, as real as any other right however well defined: and were it to be refused, or to be so shackled by regulations not necessary for the peace or safety of the inhabitants, as to render its use impracticable to us, it would then be an injury, of which we should be entitled to demand redress. The right of the upper inhabitants to use this navigation was the counterpart to that of those possessing the shores below, and

founded in the same natural relations with the soil and water. And the line at which their respective rights met was to be advanced or withdrawn, so as to equalize the inconveniences resulting to each party from the exercise of the right by the other. This estimate was to be fairly made with a mutual disposition to make equal sacrifices, and the numbers on each side ought to have their due weight in the estimate. Spain held so very small a tract of habitable land on either side below our boundary, that it might in fact be considered as a strait in the sea; for though it was eighty leagues from our southern boundary to the mouth of the river, yet it was only here and there in spots and slips that the land rises above the level of the water in times of inundation. There were then, and ever must be, so few inhabitants on her part of the river, that the freest use of its navigation might be admitted to us without their annoyance.[1]

It was essential to the interests of both parties that the navigation of the river should be free to both, on the footing on which it was defined by the treaty of Paris, viz., through its whole breadth. The channel of the Mississippi was remarkably winding, crossing and recrossing perpetually from one side to the other of the general bed of the river. Within the elbows thus made by the channel there was generally an eddy setting upwards, and it was by taking advantage of these eddies, and constantly crossing from one to another of them, that boats were enabled to ascend the river. Without this right the navigation of the whole river would be impracticable both to the Americans and Spaniards.

It was a principle that the right to a thing gives a right to the means without which it could not be used, that is to say, that the means follow the end. Thus a right to navigate a river draws to it a right to moor vessels to its shores, to land on them in cases of distress, or for other necessary purposes, &c. This principle was founded in natural reason, was evidenced by the common sense of mankind, and declared by the writers before quoted.

The Roman law, which, like other municipal laws, placed the navigation of their rivers on the footing of nature, as to their

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[1] The authorities referred to on this head were the following: Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 2, §§ 11–13; c. 3, §§ 7–12. Puffendorf, lib. iii. cap. 3, §§ 3–6. Wolff's Inst. §§ 310–312. Vattel, liv. i. 292; liv. ii. §§ 123–139.

own citizens, by declaring them public, declared also that the right to the use of the shores was incident to that of the water.[1] The laws of every country probably did the same. This must have been so understood between France and Great Britain at the treaty of Paris, where a right was ceded to British subjects to navigate the whole river, and expressly that part between the Island of New Orleans and the western bank, without stipulating a word about the use of the shores, though both of them belonged then to France, and were to belong immediately to Spain. Had not the use of the shores been considered as incident to that of the water, it would have been expressly stipulated, since its necessity was too obvious to have escaped either party. Accordingly all British subjects used the shores habitually for the purposes necessary to the navigation of the river; and when a Spanish governor undertook at one time to forbid this, and even cut loose the vessels fastened to the shores, a British vessel went immediately, moored itself opposite the town of New Orleans, and set out guards with orders to fire on such as might attempt to disturb her moorings. The governor acquiesced, the right was constantly exercised afterwards, and no interruption ever offered.

This incidental right extends even beyond the shores, when circumstances render it necessary to the exercise of the principal right; as in the case of a vessel damaged, which, as the mere shore could not be a safe deposit for her cargo till she could be repaired, may remove into safe ground off the river. The Roman law was here quoted, too, because it gave a good idea both of the extent and the limitations of this right.[1]

§ 19. Navigation of the St. Lawrence.

The relative position of the United States and Great Britain in respect to the navigation of the great northern lakes and the river St. Lawrence, appears to be similar to that of the United States and Spain, previously to the cession of Louisiana and Florida, in respect to the Mississippi; the United States being in possession of the southern shores of the

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[1] Inst. lib. ii. t. 1, §§ 1–5.

[2] Mr. Jefferson's Instructions to United States ministers in Spain, March 18, 1792. Waite's State Papers, vol. x. pp. 135–140.

lakes and the river St. Lawrence to the point where their northern boundary line strikes the river, and Great Britain, of the northern shores of the lakes and the river in its whole extent to the sea, as well as of the southern banks of the river, from the latitude 45° north to its mouth.

The claim of the people of the United States, of a right to navigate the St. Lawrence to and from the sea, was, in 1826, the subject of discussion between the American and British governments.

On the part of the United States government, this right is rested on the same grounds of natural right and obvious necessity which had formerly been urged in respect to the river Mississippi. The dispute between different European powers respecting the navigation of the Scheldt, in 1784, was also referred to in the correspondence on this subject, and the case of that river was distinguished from that of the St. Lawrence by its peculiar circumstances. Among others, it is known to have been alleged by the Dutch, that the whole course of the two branches of this river which passed within the dominions of Holland was entirely *artificial;* that it owed its existence to the skill and labor of Dutchmen; that its banks had been erected and maintained by them at a great expense. Hence, probably, the motive for that stipulation in the treaty of Westphalia, that the lower Scheldt, with the canals of Sas and Swin, and other mouths of the sea adjoining them, should be kept closed on the side belonging to Holland. But the case of the St. Lawrence was totally different, and the principles on which its free navigation was maintained by the United States had recently received an unequivocal confirmation in the solemn act of the principal States of Europe. In the treaties concluded at the Congress of Vienna, it had been stipulated that the navigation of the Rhine, the Neckar, the Mayn, the Moselle, the Maese, and the Scheldt, should be free to all nations. These stipulations, to which Great Britain was a party, might be considered as an indication of the present judgment of Europe upon the general question. The importance of the present claim might be estimated by the fact, that the inhabitants of at least eight States of the American Union, besides the Territory of Michigan, had an immediate interest in it, besides the prospective interests of other parts connected with this river and the inland seas through which it communicates with the

ocean. The right of this great and growing population to the use of this its only natural outlet to the ocean, was supported by the same principles and authorities which had been urged by Mr. Jefferson in the negotiation with Spain respecting the navigation of the river Mississippi. The present claim was also fortified by the consideration that this navigation was, before the war of the American Revolution, the common property of all the British subjects inhabiting this continent, having been acquired from France by the united exertions of the mother country and the colonies, in the war of 1756. The claim of the United States to the free navigation of the St. Lawrence was of the same nature with that of Great Britain to the navigation of the Mississippi, as recognized by the 7th article of the treaty of Paris, 1763, when the mouth and lower shores of that river were held by another power. The claim, whilst necessary to the United States, was not injurious to Great Britain, nor could it violate any of her just rights.[1]

On the part of the British government, the claim was considered as involving the question whether a *perfect* right to the free navigation of the river St. Lawrence could be maintained according to the principles and practice of the law of nations.

The liberty of passage to be enjoyed by one nation through the dominions of another was treated by the most eminent writers on public law as a qualified, occasional exception to the paramount rights of property. They made no distinction between the right of passage by a river, flowing from the possessions of one nation through those of another, to the ocean, and the same right to be enjoyed by means of any highway, whether of land or water, generally accessible to the inhabitants of the earth. The right of passage, then, must hold good for other purposes, besides those of trade, — for objects of war as well as for objects of peace, — for all nations, no less than for any nation in particular, and be attached to artificial as well as to natural highways. The principle could not, therefore, be insisted on by the American government, unless it was prepared to apply the same principle by reciprocity, in favor of British subjects, to the navigation of the Mississippi and the Hudson, access to which from Canada

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[1] American Paper on the navigation of the St. Lawrence. Congress Documents, Session 1827–1828, No. 43, p. 34.

might be obtained by a few miles of land-carriage, or by the artificial communications created by the canals of New York and Ohio. Hence the necessity which has been felt by the writers on public law, of controlling the operation of a principle so extensive and dangerous, by restricting the right of transit to purposes of *innocent* utility, to be exclusively determined by the local sovereign. Hence the right in question is termed by them an *imperfect* right. But there was nothing in these writers, or in the stipulations of the treaties of Vienna, respecting the navigation of the great rivers of Germany, to countenance the American doctrine of an absolute, natural right. These stipulations were the result of mutual consent, founded on considerations of mutual interest growing out of the relative situation of the different States concerned in this navigation. The same observation would apply to the various conventional regulations which had been, at different periods, applied to the navigation of the river Mississippi. As to any supposed right derived from the simultaneous acquisition of the St. Lawrence by the British and American people, it could not be allowed to have survived the treaty of 1783, by which the independence of the United States was acknowledged, and a partition of the British dominions in North America was made between the new government and that of the mother country.[1]

To this argument it was replied, on the part of the United States, that, if the St. Lawrence were regarded as a *strait* connecting navigable seas, as it ought properly to be, there would be less controversy. The principle on which the right to navigate straits depends, is, that they are accessorial to those seas which they unite, and the right of navigating which is not exclusive, but common to all nations; the right to navigate the seas drawing after it that of passing the straits. The United States and Great Britain have between them the exclusive right of navigating the lakes. The St. Lawrence connects them with the ocean. The right to navigate both (the lakes and the ocean) includes that of passing from one to the other through the natural link. Was it then reasonable or just that one of the two co-proprietors of the lakes should altogether exclude his associate

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[1] British Paper on the Navigation of the St. Lawrence. Session, 1827-1828, No. 43, p. 41.

from the use of a common bounty of nature, necessary to the full enjoyment of them? The distinction between the right of passage, claimed by one nation through the territories of another, on land, and that on navigable water, though not always clearly marked by the writers on public law, has a manifest existence in the nature of things. In the former case, the passage can hardly ever take place, especially if it be of numerous bodies, without some detriment or inconvenience to the State whose territory is traversed. But in the case of a passage on water no such injury is sustained. The American government did not mean to contend for any principle, the benefit of which, in analogous circumstances, it would deny to Great Britain. If, therefore, in the further progress of discovery, a connection should be developed between the river Mississippi and Upper Canada, similar to that which exists between the United States and the St. Lawrence, the American government would be always ready to apply, in respect to the Mississippi, the same principles it contended for in respect to the St. Lawrence. But the case of rivers, which rise and debouch altogether within the limits of the same nation, ought not to be confounded with those which, having their sources and navigable portions of their streams in States above, finally discharge themselves within the limits of other States below. In the former case, the question as to opening the navigation to other nations, depended upon the same considerations which might influence the regulation of other commercial intercourse with foreign States, and was to be exclusively determined by the local sovereign. But in respect to the latter the free navigation of the river was a natural right in the upper inhabitants, of which they could not be entirely deprived by the arbitrary caprice of the lower State. Nor was the fact of subjecting the use of this right to treaty regulations, as was proposed at Vienna to be done in respect to the navigation of the European rivers, sufficient to prove that the origin of the right was conventional, and not natural. It often happened to be highly convenient, if not sometimes indispensable, to avoid controversies by prescribing certain rules for the enjoyment of a natural right. The law of nature, though sufficiently intelligible in its great outlines and general purposes, does not always reach every minute detail which is called for by the complicated wants and varieties of modern navigation and com-

merce. Hence the right of navigating the ocean itself, in many instances, principally incident to a state of war, is subjected, by innumerable treaties, to various regulations. These regulations — the transactions of Vienna, and other analogous stipulations — should be regarded only as the spontaneous homage of man to the paramount Lawgiver of the universe, by delivering his great works from the artificial shackles and selfish contrivances to which they have been arbitrarily and unjustly subjected.[1] (*a*)

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[1] Mr. Secretary Clay's Letter to Mr. Gallatin, June 19, 1826. Session 1827–1828, No. 43, p. 18.

(*a*) [The American and British papers on the navigation of the St. Lawrence, first cited in the text, were annexed to the 18th and 24th protocols of the conferences of Mr. Rush and Messrs. Huskisson and Stratford Canning, in 1823–4, and were printed confidentially, for the use of the members of the Senate, in January, 1825. 18th Cong. 2d Sess. They were not, however, published till after the termination of the subsequent negotiations of Mr. Gallatin, in 1826–7, when they were again printed, with the argument of the United States, in reply, contained in the instructions of Mr. Clay, also quoted by Mr. Wheaton. The following is from a despatch of Mr. Gallatin to the Secretary of State, reporting the results of his mission: — "The British plenipotentiaries will not entertain any proposition respecting the navigation of the St. Lawrence, founded on the right claimed by the United States to navigate that river to the sea. Although it may prove hereafter expedient to make a temporary agreement, without reference to the right, (which I am not authorized to do,) I am satisfied that, for the present at least, and whilst the intercourse with the British West Indies remains interdicted, it is best to leave that by land or inland navigation with the North American British Provinces to be regulated by the laws of each country respectively. The British government will not, whilst the present state of things continues, throw any impediment in the way of that intercourse, if the United States will permit it to continue." Mr. Gallatin to Mr. Clay, 21st September, 1827. MS. Despatches.

The navigation of the continuous waters of the United States and Canada is provided for in the following articles of the treaty of June 5, 1854. The third article, whose operation may be affected at the will of the American government, by a suspension of this privilege, as stipulated for in the fourth article, on the part of Great Britain, provides for a reciprocal trade, free of duty, between the United States and the British colonies, in the articles of their respective growth and produce, as enumerated in the schedule thereto annexed.

Art. 4. It is agreed that the citizens and inhabitants of the United States shall have the right to navigate the river St. Lawrence and the canals in Canada, used as the means of communicating between the great Lakes and the Atlantic Ocean, with their vessels, boats, and crafts, as fully and freely as the subjects of her Britannic Majesty, subject only to the same tolls and other assessments as now are or may hereafter be exacted of her Majesty's said subjects; it being understood,

however, that the British government retains the right of suspending this privilege on giving due notice thereof to the government of the United States.

It is further agreed, that if at any time the British government should exercise the said reserved right, the government of the United States shall have the right of suspending, if it think fit, the operation of Article 3, of the present treaty, in so far as the province of Canada is affected thereby, for so long as the suspension of the free navigation of the river St. Lawrence or the canals may continue.

It is further agreed that British subjects shall have the right freely to navigate Lake Michigan with their vessels, boats, and crafts, so long as the privilege of navigating the river St. Lawrence, secured to Americans by the above clause of the present article, shall continue; and the government of the United States further engages to urge upon the State governments to secure to the subjects of her Britannic Majesty the use of the several State canals on terms of equality with the inhabitants of the United States.

And it is further agreed, that no export duty, or other duty, shall be levied on lumber, or timber of any kind cut on that portion of the American territory in the State of Maine, watered by the river St. John and its tributaries, and floated down that river to the sea, when the same is shipped to the United States from the province of New Brunswick.

ART. 5. The present treaty shall take effect as soon as the laws required to carry it into operation shall have been passed by the Imperial Parliament of Great Britain, and by the Provincial Parliaments of those of the British North American Colonies which are affected by this treaty on the one hand, and by the Congress of the United States on the other. Such assent having been given, the treaty shall remain in force for ten years from the date at which it may come into operation; — and further, until the expiration of twelve months after either of the high contracting parties shall give notice to the other of its wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other, at the end of the said term of ten years, or at any time afterwards.

It is clearly understood, however, that this stipulation is not intended to affect the reservation made by article 4 of the present treaty, with regard to the right of temporarily suspending the operations of articles 3 and 4 thereof.

ART. 6. And it is hereby further agreed, that the provisions and stipulations of the foregoing articles shall extend to the Island of Newfoundland, so far as they are applicable to that colony. But if the Imperial Parliament, the Provincial Parliament of Newfoundland, or the Congress of the United States, shall not embrace in their laws, enacted for carrying this treaty into effect, the Colony of Newfoundland, then this article shall be of no effect; but the omission to make provision by law to give it effect, by either of the legislative bodies aforesaid, shall not impair the remaining articles of this treaty.

Treaties have been negotiated by the United States, with Paraguay and the Argentine Confederation, with regard to the navigable rivers within those countries, though we have no claim founded on the ownership of the adjacent territory: and similar negotiations are pending with Brazil for the navigation of the Amazon. Separate treaties were signed, 10th July, 1853, by the Argentine Republic with the United States, France, and England, for the free navigation of the Purana and Uruguay, with a provision that Brazil, Paraguay, Uruguay, and Bolivia, might become parties to them. Annuaire, &c., 1853–4, App. 943.

President Pierce's message, at the opening of the 1st Session of the 33d Congress contains the following reference to the navigation of the great rivers of South America:

"Considering the vast regions of this continent, and the number of States which would be made accessible by the free navigation of the river Amazon, particular attention has been given to this subject. Brazil, through whose territories it passes into the ocean, has hitherto persisted in a policy so restrictive, in regard to the use of this river, as to obstruct, and nearly exclude, foreign commercial intercourse with the States which lie upon its tributaries and upper branches. Our minister to that country is instructed to obtain a relaxation of that policy, and to use his efforts to induce the Brazilian government to open to common use, under proper safeguards, this great natural highway for international trade. Several of the South American States are deeply interested in this attempt to secure the free navigation of the Amazon; and it is reasonable to expect their coöperation in the measure. As the advantages of free commercial intercourse among nations are better understood, more liberal views are generally entertained as to the common rights of all to the free use of those means which nature has provided for international communication. To those more liberal and enlightened views, it is hoped that Brazil will conform her policy, and remove all unnecessary restrictions upon the free use of a river, which traverses so many States and so large a part of the continent. I am happy to inform you that the Republic of Paraguay and the Argentine Confederation have yielded to the liberal policy still resisted by Brazil, in regard to the navigable rivers within their respective territories. Treaties embracing this subject, among others, have been negotiated with these governments, which will be submitted to the Senate at the present session." Cong. Doc. Senate, 33d Cong. 1 Sess., Ex. Doc., No. 1, p. 7.

A treaty was concluded on 23d October, 1851, between Brazil and Peru, to regulate the navigation of the Amazon, the first article of which provides: — "Art. 1er. La république du Pérou et sa Majesté l'Empereur du Brésil, désirant promouvoir respectivement la navigation du fleuve des Amazones et des affluens par des bâtimens à vapeur qui, en assurant l'exportation des immenses produits de ces vastes régions, contribuent à augmenter le nombre de leurs habitans et à civiliser les tribus sauvages, conviennent que les marchandises, produits, et embarcations qui passeront du Brésil au Pérou, et réciproquement, par la frontière et les fleuves de l'un et l'autre état, seront exempts de tous droits autres que ceux auxquels sont assujettis les produits nationaux avec lesquels ils seront placés sur un pied de complète égalité. Annuaire des Deux Mondes, 1852–3. Appendice, p. 934. By the treaty between the United States and Peru, concluded on 26th July, 1851, there are reciprocal stipulations that neither party will grant to other nations any favors, privileges, or immunities that shall not be immediately extended to citizens of the other contracting party, gratuitously, if the concession was gratuitous, or for an equivalent, if the concession was conditional — that the duties on account of tonnage, &c., and other local charges, in the ports of the respective countries, shall be the same for vessels of both parties. There was also a stipulation that citizens of the United States, establishing a line of steam vessels, between the different ports of entry within the Peruvian territories, should have all the privileges and favors enjoyed by any other association or company whatever, and the article concludes with the following provision: "It is furthermore

understood between the two high contracting parties that the steam vessels of either shall not be subject in the ports of the other party to any duties of tonnage, harbor, or other similar duties whatsoever than those that are or may be paid by any other association or company." Arts. 2, 4, 10 — Minot's Treaties of the United States, 1851–2, pp. 28, 29, 32.

That the privileges obtained by Peru accrued to the benefit of the United States and of other nations, having similar treaties with her, was the construction first put on the treaty of 23d October, 1851, by the government of that country. By a decree of 15th of April, 1853, in reference to the opening of the Amazon, it is provided, Art. 1, that in conformity with the treaty between Peru and Brazil of 23d October, 1851, and during the time it is in force, the navigation of the Amazon, as far as the port of Nauta, at the mouth of the Ucayali, is open to the navigation, traffic, and commerce of the vessels and subjects of Brazil. Art. 2. Subjects and citizens of other nations, who have treaties with Peru on the same terms as the most favored nation, are entitled to the same privileges as the Brazilians. Peruvian Decree of 15th April, 1853.

The Peruvian government having subsequently, on the representation of Brazil, taken a different view of its obligations, the Envoy of the United States thus meets the argument, by which it is attempted to withdraw the concessions as to the Amazon, in the treaty with Brazil, from the operation of previous reciprocity treaties.

"His Excellency states, that the United States cannot claim to be put upon the same footing as Brazil in the Peruvian rivers, because the steam company which is now navigating the Amazon has been established with the funds of the two nations, and is a private affair of their own; that the navigation of that river belongs in common to the riparian [*Riberenas*] nations, whence it is inferred that Peru, as one of them, cannot concede rights which she alone does not possess; that the fluvial navigation belonging to the riparian nations is an international servitude, emanating from dominion in their respective territories, and from their relative position upon the navigable waters; and, finally, that this servitude being active and passive at the same time, since the parties interested enjoy it because they suffer it, cannot be alienated to a third party by the exclusive will of one participant.

"The Amazon is formed by the confluent streams that flow through the territory of six sovereign nations, five of which are the owners of navigable tributary rivers, whose total course is comprehended within their own territories, until they empty into the central channel owned by Brazil. As each of these five nations contribute with their waters to form the central channel, this latter becomes a public inland highway for each to enter and depart from her dominions. Over the central channel or the Amazon, which flows almost entirely through the territory of Brazil, none of the nations hold exclusive jurisdiction, because neither is the owner of all the waters which form it.

"From the fact of the channel of the Amazon being a public international highway, it is not inferred that its head waters and confluents should also be so. when each flows entirely through the territory of one of the riparian States. Bolivia, for example, owns the whole course of the Marmoré and of the Beni, until their junction with the Itenes, which together form the Madeira, and Peru owns the Ucayali and the Huallaga. The position of both States has always given them a

right to the innocent use of the lower Amazon, because they have had original and exclusive jurisdiction over the upper waters, and can follow them down to the ocean.

"The joint ownership in the central channel of the Amazon commences at the point where the confluent streams of one of the riparian nations cross its frontier and flow through the territory of another State. But it cannot be hence inferred that Brazil, as the proprietor of the mouths of the Amazon, has always had the right of transit through the upper waters not within her territory (Agenas,) or what is more extraordinary, that she should have had original dominion and jurisdiction over those waters, when, in reality, the dominion she exercises commences from the places where the foreign rivers enter her territory. To assert the contrary would be to fall into an inversion of unacceptable terms. If, therefore, joint ownership exists among the riparian nations, it begins for Brazil at the frontier of the empire, and not before. This is virtually acknowledged by Peru and Brazil by the terms of the second article of their treaty, wherein it is said that the navigation 'of the Amazon from its mouth to the bank in Peru, must belong to the respective riparian States.'

"With respect to the parity which his Excellency desires to establish between the servitudes described by the civil law, when treating of the right of way ('via'—'iter') through foreign landed property, and the international right of transit by a common river, the undersigned thinks it superfluous to demonstrate the impossibility of such a parity. It is sufficient for him to indicate that if both cases were identical, none of the riparian States could conclude treaties with a foreign power, opening their rivers to foreign navigation and commerce, without the permission and concert of the other riparian States; so that it would find itself really deprived of one of the attributes inherent to every sovereign nation.

"It being clear, therefore, that Brazilian vessels could not legally navigate the Peruvian rivers prior to the treaty of the 23d October, 1851, the admission of the Brazilian company's steamers into the Peruvian waters of the Amazon has been a concession or favor granted to Brazil, in which the United States must immediately participate, according to the terms of the treaty of the 26th July, 1851." Mr. Clay to the Minister of State in the Department of Foreign Relations. Lima, February 4, 1854. Congress. Documents.

By a law of the 26th November, 1853, Ecuador declared free, with an entire exemption from all charges or duties on vessels and cargoes, the navigation of the internal rivers of the republic, including their portion of the Amazon. Annuaire, &c., 1853-4, p. 824.]

PART THIRD.

INTERNATIONAL RIGHTS OF STATES IN THEIR PACIFIC RELATIONS.

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INTERNATIONAL RIGHTS OF STATES IN THEIR PACIFIC RELATIONS.

CHAPTER I.

RIGHTS OF LEGATION.

§ 1. Usage of permanent diplomatic missions.

THERE is no circumstance which marks more distinctly the progress of modern civilization, than the institution of permanent diplomatic missions between different States. The rights of ambassadors were known, and, in some degree, respected by the classic nations of antiquity. During the middle ages they were less distinctly recognized, and it was not until the seventeenth century that they were firmly established. The institution of resident permanent legations at all the European courts took place subsequently to the peace of Westphalia, and was rendered expedient by the increasing interest of the different States in each other's affairs, growing out of more extensive commercial and political relations, and more refined speculations respecting the balance of power, giving them the right of mutual inspection as to all transactions by which that balance might be affected. Hence the rights of legation have become definitely ascertained and incorporated into the international code.

§ 2. Right to send, and obligation to receive, public ministers.

Every independent State has a right to send public ministers to, and receive ministers from, any other sovereign State with which it desires to maintain the relations of peace and amity. No State, strictly speaking,

is obliged, by the positive law of nations, to send or receive public ministers, although the usage and comity of nations seem to have established a sort of reciprocal duty in this respect. It is evident, however, that this cannot be more than an imperfect obligation, and must be modified by the nature and importance of the relations to be maintained between different States by means of diplomatic intercourse.[1]

§ 3. Rights of legation, to what States belonging.

How far the rights of legation belong to dependent or semi-sovereign States, must depend upon the nature of their peculiar relation to the superior State under whose protection they are placed. Thus, by the treaty concluded at Kainardgi, in 1774, between Russia and the Porte, the provinces of Moldavia and Wallachia, placed under the protection of the former power, have the right of sending chargés d'affaires of the Greek communion to represent them at the court of Constantinople.[2] (*a*)

So also of confederated States; their right of sending public ministers to each other, or to foreign States, depends upon the peculiar nature and constitution of the union by which they are

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[1] Vattel, Droit des Gens, liv. iv. ch. 5, §§ 55–65. Rutherforth's Institutes, vol. ii. b. ii. ch. 9, § 20. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. vii. ch. 1, §§ 187–190.

[2] Vattel, liv. iv. ch. 5, § 60. Klüber, Droit des Gens Moderne de l'Europe, st. 2, tit. 2, ch. 3, § 175. Merlin, Répertoire, tit. *Ministre publique*, sect. ii. § 1. No. 3, 4.

(*a*) [Les chargés d'affaires de Moldavie et de Valachie près de la Porte Ottomane, dont parle le traité de Kainardgy, ne sont pas proprement des agens diplomatiques, ni ne résident avec le corps diplomatique accrédité auprès de la Porte. Dès long temps les Pachas et Gouverneurs des Provinces Ottomanes étoient dans l'habitude d'entretenir auprès de l'Administration Centrale, c'est à dire, auprès de la Porte, des agens appellés Kayson Kehagasi, (littéralement agens auprès de la Porte): servant d'intermédiaires entre cette administration et leur commettans. Comme les Hospodars de la Moldavie et de la Valachie, à l'époque de la paix de Kainardgy, trahissoient régulièrement le Sultan dans toute crise politique un peu sérieuse, et qu'alors la Porte s'en prenoit volontiers aux Kayson Kehagasi des Hospodars, d'ordinaire les confidens de ceux-ci lesquels se rétiroient au besoin en pays étranger, la stipulation en question du traité de Kainardgy n'eut proprement pour l'objet que de conserver, en pareil cas, la vie sauve au Phanariote chargé des fonctions de Kayson Kehagasi. Kupfer's Remarks on the "Elements of International Law." Wheaton's MS. Papers.]

bound together. Under the constitution of the former German Empire, and that of the present Germanic Confederation, this right is preserved to all the princes and States composing the federal union. Such was also the former Constitution of the United Provinces of the Low Countries, and such is now that of the Swiss Confederation. By the Constitution of the United States of America every State is expressly forbidden from entering, without the consent of Congress, into any treaty, alliance, or confederation, with any other State of the Union, or with a foreign State, or from entering, without the same consent, into any agreement or compact with another State, or with a foreign power. The original power of sending and receiving public ministers is essentially modified, if it be not entirely taken away, by this prohibition.[1]

§ 4. How affected by civil war or contest for the sovereignty.

The question, to what department of the government belongs the right of sending and receiving public ministers, also depends upon the municipal constitution of the State. In monarchies, whether absolute or constitutional, this prerogative usually resides in the sovereign. In republics, it is vested either in the chief magistrate, or in a senate or council, conjointly with, or exclusive of such magistrate. In the case of a revolution, civil war, or other contest for the sovereignty, although, strictly speaking, the nation has the exclusive right of determining in whom the legitimate authority of the country resides, yet foreign States must of necessity judge for themselves whether they will recognize the government *de facto*, by sending to, and receiving ambassadors from it; or whether they will continue their accustomed diplomatic relations with the prince whom they choose to regard as the legitimate sovereign, or suspend altogether these relations with the nation in question. So, also, where an empire is severed by the revolt of a province or colony declaring and maintaining its independence, foreign States are governed by expediency in determining whether they will commence diplomatic intercourse with the new State, or wait for its recognition by the metropolitan country.[2]

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[1] Heffter, das Europäische Völkerrecht, § 200. Merlin, Répertoire, tit. *Ministre publique*, sect. ii. § 1, No. 5.

[2] Vide suprà, Pt. I. ch. 2, §§ 7–10, pp. 31–34. Merlin, Répertoire, tit. *Ministre publique*, sect. ii. § 6.

For the purpose of avoiding the difficulties which might arise from a formal and positive decision of these questions, diplomatic agents are frequently substituted, who are clothed with the powers, and enjoy the immunities of ministers, though they are not invested with the representative character, nor entitled to diplomatic honors. (*a*)

§ 5. Conditional reception of foreign ministers.

As no State is under a *perfect* obligation to receive ministers from another, it may annex such conditions to their reception as it thinks fit; but when once received, they are, in all other respects, entitled to the privileges annexed by the law of nations to their public character. Thus some governments have established it as a rule not to receive one of their own native subjects as a minister from a foreign power; and a government may receive one of its own subjects, under the expressed condition that he shall continue amenable to the local laws and jurisdiction. So, also, one court may absolutely refuse to receive a particular individual as minister from another court, alleging the motives on which such refusal is grounded.[1]

(*a*) [In the case of the last change in the Constitution of France, by the elevation of the Emperor Napoleon III. the following instructions were sent, by the Secretary of State to the Minister at Paris.

"From President Washington's time down to the present it has been a principle, always acknowledged by the United States, that every nation possesses a right to govern itself according to its own will, to change its institutions at discretion, and to transact its business through whatever agents it may think proper to employ. This cardinal point in our own policy has been strongly illustrated by recognizing the many forms of political power, which have been successively adopted by France in the series of revolutions, with which that country has been visited. Throughout all these changes the government of the United States has governed itself in strict conformity to the original principles adopted by Washington, and made known to our diplomatic agents abroad, and to the nations of the world by Mr. Jefferson's letter to Gouverneur Morris, of the 12th of March, 1793: and if the French people have now, substantially, made another change, we have no choice but to acknowledge that also, and as the diplomatic representative of your country in France, you will act as your predecessors have acted and conform to what appears to be settled national authority." Mr. Webster to Mr. Rives, Cong. Doc. 1851–2. Vol. 4, Doc. 19.]

[1] Bynkershoek, de Foro Competent. Legatorum, cap. 11, § 10. Martens, Manuel Diplomatique, ch. 1, § 6. Merlin, Répertoire, tit. *Ministre publique*, sect. iii. § 5.

§ 6. Classification of public ministers.

The primitive law of nations makes no other distinction between the different classes of public ministers, than that which arises from the nature of their functions; but the modern usage of Europe having introduced into the voluntary law of nations certain distinctions in this respect, which, for want of exact definition, became the perpetual source of controversies, uniform rules were at last adopted by the Congress of Vienna, and that of Aix-la-Chapelle, which put an end to those disputes. By the rules thus established, public ministers are divided into the four following classes:

1. Ambassadors, and papal legates or nuncios.
2. Envoys, ministers, or others accredited to sovereigns (auprès des souverains.)
3. Ministers resident accredited to sovereigns.
4. Chargés d'affaires accredited to the minister of foreign affairs.[1]

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[1] The *recez* of the Congress of Vienna of the 19th of March, 1815, provides:

"Art. 1. Les employés diplomatiques sont partagés en trois classes:

" Celle des ambassadeurs, légats ou nonces;

" Celle des envoyés, ministres, ou autres accrédités auprès des souverains;

" Celle des chargés d'affaires accrédités auprès des ministres chargés des affaires étrangères.

"Art. 2. Les ambassadeurs, légats ou nonces, ont seuls le caractère représentatif.

"Art. 3. Les employés diplomatiques en mission extraordinaire, n'ont, à ce titre, aucune supériorité de rang.

"Art. 4. Les employés diplomatiques prendront rang, entre eux, dans chaque classe, d'après la date de la notification officielle de leur arrivée.

"Le présent réglement n'apportera aucune innovation relativement aux représentans du Pape.

"Art. 5. Il sera déterminé dans chaque état un mode uniforme pour la réception des employés diplomatiques de chaque classe.

"Art. 6. Les liens de parenté ou d'alliance de famille entre les cours, ne donnent aucun rang à leurs employés diplomatiques.

" Il en est de même des alliances politiques.

"Art. 7. Dans les actes ou traités entre plusieurs puissances, qui admettent l'alternat, le sort décidera, entre les ministres, de l'ordre qui devra être suivi dans les signatures."

The protocol of the Congress of Aix-la-Chapelle of the 21st November, 1818. declares:

"Pour éviter les discussions désagréables qui pourraient avoir lieu à l'avenir sur un point d'étiquette diplomatique, que l'annexe du recez de Vienne, par

Ambassadors and other public ministers of the first class are exclusively entitled to what is called the *representative* character, being considered as peculiarly representing the sovereign or State by whom they are delegated, and entitled to the same honors to which their constituent would be entitled, were he personally present. This must, however, be taken in a general sense, as indicating the sort of honors to which they are entitled; but the exact ceremonial to be observed towards this class of ministers depends upon usage, which has fluctuated at different periods of European history. There is a slight shade of difference between ambassadors ordinary and extraordinary; the former designation being exclusively applied to those sent on permanent missions, the latter to those employed on a particular or extraordinary occasion, though it is sometimes extended to those residing at a foreign court for an indeterminate period.[1]

The right of sending ambassadors is exclusively confined to crowned heads, the great republics, and other States entitled to royal honors.[2]

All other public ministers are destitute of that particular character which is supposed to be derived from representing generally the person and dignity of the sovereign. They represent him only in respect to the particular business committed to their charge at the court to which they are accredited.[3]

Ministers of the second class are envoys, envoys extraordinary, ministers plenipotentiary, envoys extraordinary and ministers plenipotentiary, and internuncios of the pope.[4]

So far as the relative rank of diplomatic agents may be determined by the nature of their respective functions, there is no essential difference between public ministers of the first class and those of the second. Both are accredited by the sovereign, or

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lequel les questions de rang ont été réglées, ne parait pas avoir prévu, il est arrêté entre les cinq cours, que les ministres résidens, acerédités auprès d'elles formeront, par rapport à leur rang, une classe intermédiaire entre les ministres du second ordre et les chargés d'affaires."

[1] Vattel, Droit des Gens, liv. iv. ch. 6, §§ 70–79. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. vii. ch. 9, § 192. Martens, Manuel Diplomatique, ch. 1, § 9.

[2] Martens, Précis, &c., liv. vii. ch. 2, § 198. Vide ante, Pt. II. ch. 3, § 2, p. 210.

[3] Martens, Manuel Diplomatique, ch. 1, § 10.

[4] Ibid.

supreme executive power of the State, to a foreign sovereign. The distinction between ambassadors and envoys was originally grounded upon the supposition, that the former are authorized to negotiate directly with the sovereign himself; whilst the latter, although accredited to him, are only authorized to treat with the minister of foreign affairs or other person empowered by the sovereign. The authority to treat directly with the sovereign was supposed to involve a higher degree of confidence, and to entitle the person, on whom it was conferred, to the honors due to the highest rank of public ministers. This distinction, so far as it is founded upon any essential difference between the functions of the two classes of diplomatic agents, is more apparent than real. The usage of all times, and especially the more recent times, authorizes public ministers of every class to confer, on all suitable occasions, with the sovereign at whose court they are accredited, on the political relations between the two States. But even at those periods when the etiquette of European courts confined this privilege to ambassadors, such verbal conferences with the sovereign were never considered as binding official acts. Negotiations were then, as now, conducted and concluded with the minister of foreign affairs, and it is through him that the determinations of the sovereign are made known to foreign ministers of every class. If this observation be applicable as between States, according to whose constitutions of government negotiations may, under certain circumstances, be conducted directly between their respective sovereigns, it is still more applicable to representative governments, whether constitutional monarchies or republics. In the former, the sovereign acts, or is supposed to act, only through his responsible ministers, and can only bind the State and pledge the national faith through their agency. In the latter, the supreme executive magistrate cannot be supposed to have any relations with a foreign sovereign, such as would require or authorize direct negotiations between them respecting the mutual interests of the two States.[1]

In the third class are included ministers, ministers resident, residents, and ministers chargés d'affaires, accredited to sovereigns.[2]

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[1] Pinheiro-Ferreira, Notes to Martens, Précis du Droit des Gens, tom. ii. Notes 12, 14.

[2] Martens, Précis, &c., liv. vii. ch. ii. § 194.

Chargés d'affaires, accredited to the ministers of foreign affairs of the court at which they reside, are either chargés d'affaires *ad hoc*, who are originally sent and accredited by their governments, or chargés d'affaires *per interim*, substituted in the place of the minister of their respective nations during his absence.[1] (*a*)

According to the rule prescribed by the Congress of Vienna, and which has since been generally adopted, public ministers take rank between themselves, in each class, according to the date of the official notification of their arrival at the court to which they are accredited.[2]

The same decision of the Congress of Vienna has also abolished all distinctions of rank between public ministers, arising from consanguinity and family or political relations between their different courts.[3]

A State which has a right to send public ministers of different classes, may determine for itself what rank it chooses to confer upon its diplomatic agents; but usage generally requires that those who maintain permanent missions near the government of each other should send and receive ministers of equal rank. One minister may represent his sovereign at different courts, and a State may send several ministers to the same court. A minister or ministers may also have full powers to treat with foreign States, as at a Congress of different nations, without being accredited to any particular court.[4] (*b*)

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[1] Martens, Manuel Diplomatique, ch. 1, § 11.

(*a*) [On occasion of an appeal made by Mr. Hülsemann, chargé d'affaires of Austria, to the President, in reference to some proceedings of the Secretary of State, Mr. Webster thus wrote, under date of June 8, 1852, to the American chargé d'affaires, at Vienna: — "The Chevalier Hülsemann should know that a chargé d'affaires, whether regularly commissioned or acting as such without commission, can hold official intercourse only with the Department of State. He had no right even to converse with the President on matters of business, and may consider it a liberal courtesy that he is presented to him at all. Although usually we are not rigid in these matters, yet a marked disregard of ordinary forms implies disrespect to the government itself." Congressional Documents.]

[2] Recez du Congrès de Vienne du 19 Mars, 1815, art. 4.

[3] Ibid. art. 6.

[4] Martens, Précis, &c., liv. vii. ch. 2, §§ 199 – 204.

(*b*) [Eu égard à l'état de la part duquel un ministre public est envoyé, celui-ci réunit dans sa personne deux qualités différentes. Il est *fonctionnaire public* de cet état, et il est son mandataire par rapport à sa mission diplomatique. Relativement aux états autres que ceux près lesquels il est accredité, un ministre

Consuls, and other commercial agents, not being accredited to the sovereign or minister of foreign affairs, are not, in general, considered as public ministers; but the consuls maintained by the Christian Powers of Europe and America near the Barbary States are accredited and treated as public ministers.[1]

§ 7. Letters of credence.

Every diplomatic agent, in order to be received in that character, and to enjoy the privileges and honors attached to his rank, must be furnished with a letter of credence. In the case of an ambassador, envoy, or minister, of either of the three first classes, this letter of credence is addressed by the sovereign, or other chief magistrate of his own State, to the sovereign or State to whom the minister is delegated. In the case of a chargé d'affaires, it is addressed by the secretary, or minister of state charged with the department of foreign affairs, to the minister of foreign affairs of the other government. It may be in the form of a *cabinet letter*, but is more generally in that of a *letter of council*. If the latter, it is signed by the sovereign or chief magistrate, and sealed with the great seal of State. The minister is furnished with an authenticated copy, to be delivered to the minister of foreign affairs, on asking an audience for the purpose of delivering the original to the sovereign, or other chief magistrate of the State, to whom he is sent. The letter of credence states the general object of his mission, and requests that full faith and credit may be given to what he shall say on the part of his court.[2]

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public n'est considéré que sous les rapports généraux d'un citoyen, (Wicquefort, liv. i. sec. 15.) Il est néanmoins d'usage d'accorder, par complaisance, certaines immunités à un ministre public étranger à son passage par le pays. Il n'est point dérogé à la qualité ni aux prérogatives d'un ministre public, chargé de négotiations avec des puissances étrangères, lorsqu'il est revêtu du titre de commissaire ou de commission, de deputé ou de députation, comme cela a quelquefois eu lieu dans les négotiations, sur les limites de l'état, &c. Ce n'est point encore proprement un ministre public que celui qu' un gouvernement envoie à celui d'un autre état pour des affaires publiques, mais sans le revêtir d'un titre d'envoyé diplomatique, quoique d'ailleurs le fait de sa mission ne soit point caché. Klüber, Droit des Gens Moderne de l'Europe, §§ 170, 171, 172.]

[1] Bynkershoek, de Foro Competent. Legat. cap. 10, §§ 4–6. Martens, Manuel Diplomatique, ch. 1, § 13. Vattel, liv. ii. ch. 2, § 34. Wicquefort, de l'Ambassadeur, liv. i. § 1, p. 63.

[2] Martens, Précis, &c., liv. vii. ch. 3, § 202. Wicquefort, de l'Ambassadeur, liv. i. § 15.

§ 8. Full power.

The full power, authorizing the minister to negotiate, may be inserted in the letter of credence, but it is more usually drawn up in the form of letters-patent. In general, ministers sent to a Congress are not provided with a letter of credence, but only with a full power, of which they reciprocally exchange copies with each other, or deposit them in the hands of the mediating power or presiding minister.[1]

§ 9. Instructions.

The instructions of the minister are for his own direction only, and not to be communicated to the government to which he is accredited, unless he is ordered by his own government to communicate them *in extenso*, or partially; or unless, in the exercise of his discretion, he deems it expedient to make such a communication.[2]

§ 10. Passport.

A public minister, proceeding to his destined post in time of peace, requires no other protection than a passport from his own government. In time of war, he must be provided with a safe conduct or passport, from the government of the State with which his own country is in hostility, to enable him to travel securely through its territories.[3]

§ 11. Duties of a public minister, on arriving at his post.

It is the duty of every public minister, on arriving at his destined post, to notify his arrival to the minister of foreign affairs. If the foreign minister is of the first class, this notification is usually communicated by a secretary of embassy or legation, or other person attached to the mission, who hands to the minister of foreign affairs a copy of the letter of credence, at the same time requesting an audience of the sovereign for his principal. Ministers of the second and third classes generally notify their arrival by letter to the minister of foreign affairs, requesting him to take the orders of the sovereign, as to the delivery of their letters of credence. Chargés d'affaires, who are not accredited to the sovereign, notify their arrival in the same manner, at the same time requesting an

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[1] Wicquefort, liv. i. § 16. Martens, Précis, &c., liv. vii. ch. 3, § 204. Manuel Diplomatique, ch. ii. § 17.

[2] Manuel Diplomatique, ch. 2, § 16.

[3] Vattel, liv. iv. ch. 7, § 85. Manuel Diplomatique, ch. 2, § 19. Flassan, Histoire de la Diplomatie Française, tom. v. p. 246.

audience of the minister of foreign affairs for the purpose of delivering their letters of credence.

§ 12. Audience of the sovereign, or chief magistrate.

Ambassadors, and other ministers of the first class, are entitled to a *public* audience of the sovereign; but this ceremony is not necessary to enable them to enter on their functions, and, together with the ceremony of the *solemn entry*, which was formerly practised with respect to this class of ministers, is now usually dispensed with, and they are received in a *private* audience, in the same manner as other ministers. At this audience the letter of credence is delivered, and the minister pronounces a complimentary discourse, to which the sovereign replies. In republican States, the foreign minister is received in a similar manner, by the chief executive magistrate or council, charged with the foreign affairs of the nation.[1]

§ 13. Diplomatic etiquette.

The usage of civilized nations has established a certain etiquette, to be observed by the members of the diplomatic corps, resident at the same court, towards each other, and towards the members of the government to which they are accredited. The duties which comity requires to be observed, in this respect, belong rather to the code of manners than of laws, and can hardly be made the subject of positive sanction; but there are certain established rules in respect to them, the non-observance of which may be attended with inconvenience in the performance of more serious and important duties. Such are the visits of etiquette, which the diplomatic ceremonial of Europe requires to be rendered and reciprocated, between public ministers resident at the same court.[2]

§ 14. Privileges of a public minister.

From the moment a public minister enters the territory of the State to which he is sent, during the time of his residence, and until he leaves the country, he is entitled to an entire exemption from the local jurisdiction, both civil and criminal. Representing the rights, interests, and dignity of the sovereign or State by whom he is delegated, his person is sacred and inviolable. To give a more lively idea of this complete exemption from the local jurisdiction, the fiction

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[1] Martens, Manuel Diplomatique, ch. 4, §§ 33-36.

[2] Manuel Diplomatique, ch. 4, § 37.

of extraterritoriality has been invented, by which the minister, though actually in a foreign country, is supposed still to remain within the territory of his own sovereign. He continues still subject to the laws of his own country, which govern his personal *status* and rights of property, whether derived from contract, inheritance, or testament. His children born abroad are considered as natives. This exemption from the local laws and jurisdiction is founded upon mutual utility, growing out of the necessity that public ministers should be entirely independent of the local authority, in order to fulfil the duties of their mission. The act of sending the minister on the one hand, and of receiving him on the other, amounts to a tacit compact between the two States that he shall be subject only to the authority of his own nation.[1]

The passports or safe conduct, granted by his own government in time of peace, or by the government to which he is sent in time of war, are sufficient evidence of his public character for this purpose.[2]

§ 15. Exceptions to the general rule of exemption from the local jurisdiction.

This immunity extends, not only to the person of the minister, but to his family and suite, secretaries of legation and other secretaries, his servants, movable effects, and the house in which he resides.[3]

The minister's person is, in general, entirely exempt both from the civil and criminal jurisdiction of the country where he resides. To this general exemption there may be the following exceptions :

1. This exemption from the jurisdiction of the local tribunals and authorities does not apply to the *contentious* jurisdiction,

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[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, § 1–6. Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 20. Wicquefort, de l'Ambassadeur, liv. i. § 27. Bynkershoek, de Jure Competent. Legat. cap. 5, 8. Vattel, Droit des Gens, liv. iv. ch. 7, §§ 81–125. Martens, Précis, &c., liv. vii. ch. 5, §§ 214–218. Klüber, Droit des Gens Moderne de l'Europe, Pt. II. tit. 2, § 203. Fœlix, Droit International Privé, § 184. Wheaton, Hist. Law of Nations, pp. 237–243.

[2] Vattel, liv. iv. ch. 7, § 83.

[3] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, §§ 8, 9. Bynkershoek, de Foro Competent Legat. cap. 13, § 5, cap. 15, 20. Vattel, liv. iv. ch. 8, § 113 ; ch. 9, §§ 117–123. Martens, Précis, &c., liv. vii. ch. 5, §§ 215–227 ; ch. 9, §§ 234–237. Fœlix, §§ 184–186.

which may be conferred on those tribunals by the minister voluntarily making himself a party to a suit at law.[1]

2. If he is a citizen or subject of the country to which he is sent, and that country has not renounced its authority over him, he remains still subject to its jurisdiction. But it may be questionable whether his reception as a minister from another power, without any express reservation as to his previous allegiance, ought not to be considered as a renunciation of this claim, since such reception implies a tacit convention between the two States that he shall be entirely exempt from the local jurisdiction.[2]

3. If he is at the same time in the service of the power who receives him as a minister, as sometimes happens among the German courts, he continues still subject to the local jurisdiction.[3] (*a*)

4. In case of offences committed by public ministers, affecting the existence and safety of the State where they reside, if the danger is urgent, their persons and papers may be seized, and they may be sent out of the country. In all other cases, it appears to be the established usage of nations to request their recall by their own sovereign, which, if unreasonably refused by him, would unquestionably authorize the offended State to send away the offender. There may be other cases which might, under circumstances of sufficient aggravation, warrant the State thus offended in proceeding against an ambassador as a public enemy, or in inflicting punishment upon his person, if justice should be refused by his own sovereign. But the circumstances which would authorize such a proceeding are hardly capable of precise definition, nor can any general rule be collected from the examples to be found in the history of nations, where public ministers have thrown off their public character, and plotted against the safety of the State to which they were accredited. These anomalous exceptions to the general rule resolve them-

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[1] Bynkershoek, cap. 16, §§ 13–15. Vattel, liv. iv. ch. 8, § 111. Martens, Précis, &c., liv. vii. ch. 5, § 216. Merlin, Répertoire, art. *Ministre Publique*, sect. v. § 4, No. 10.

[2] Bynkershoek, cap. 11. Vattel, liv. ch. 8, § 112.

[3] Martens, Manuel Diplomatique, ch. 3, § 23.

(*a*) [The German Diet refuse to receive any citizen of Frankfort as minister of a confederated State, except from the city itself. Klüber, § 186.]

selves into the paramount right of self-preservation and necessity. Grotius distinguishes here between what may be done in the way of self-defence and what may be done in the way of punishment. Though the law of nations will not allow an ambassador's life to be taken away as a punishment for a crime after it has been committed, yet this law does not oblige the State to suffer him to use violence without endeavoring to resist it.[1]

§ 16. Personal exemption extending to his family, secretaries, servants, &c.

The wife and family, servants and suite, of the minister, participate in the inviolability attached to his public character. The secretaries of embassy and legation are especially entitled, as official persons, to the privileges of the diplomatic corps, in respect to their exemption from the local jurisdiction.[2]

The municipal laws of some, and the usages of most nations, require an official list of the domestic servants of foreign ministers to be communicated to the secretary or minister of foreign affairs, in order to entitle them to the benefit of this exemption.[3] (*a*)

It follows from the principle of the extraterritoriality of the minister, his family, and other persons attached to the legation, or belonging to his suite, and their exemption from the local laws and jurisdiction of the country where they reside, that the

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[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, § 4. Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 20. Bynkershoek, de Foro Competent. Legat. cap. 17, 18, 19. Vattel, liv. iv. ch. 7, §§ 94–102. Martens, Précis, &c., liv. vii. ch. 5, § 218. Ward's Hist. of the Law of Nations, vol. ii. ch. 17, pp. 291–334. Wheaton's Hist. Law of Nations, pp. 250–254.

[2] Grotius, lib. ii. cap. 18, § 8. Bynkershoek, cap. 15, 20. Vattel, liv. iv. ch. 9, § 120–123. Martens, Précis, &c., liv. vii. ch. 5, § 219; ch. 9, §§ 234–237. Fœlix, § 184.

[3] Blackstone's Commentaries, vol. i. ch. 7. LL. of the United States, vol. i. ch. 9, § 26.

(*a*) [The French code makes no provision for the case of the violation of the rights of ambassadors. One was reported declaring that they were not amenable to the tribunals of France, either for civil or criminal matters; but it was stricken out by the Council of State, at the suggestion of Portalis, that whatever regarded ambassadors belonged to the law of nations, and that it had no place in a municipal code. Fœlix, § 167. See also the same work, § 168, and the following sections, for the provisions of other countries as to the rights of ambassadors.]

civil and criminal jurisdiction over these persons rests with the minister, to be exercised according to the laws and usages of his own country. In respect to civil jurisdiction, both contentious and voluntary, this rule is, with some exceptions, followed in the practice of nations. But in respect to criminal offences committed by his domestics, although in strictness the minister has a right to try and punish them, the modern usage merely authorizes him to arrest and send them for trial to their own country. He may, also, in the exercise of his discretion, discharge them from his service, or deliver them up for trial under the laws of the State where he resides; as he may renounce any other privilege to which he is entitled by the public law.[1]

§ 17. Exemption of the minister's house and property.

The personal effects or movables belonging to the minister, within the territory of the State where he resides, are entirely exempt from the local jurisdiction; so, also, of his dwelling-house; but any other real property, or immovables, of which he may be possessed within the foreign territory, is subject to its laws and jurisdiction. Nor is the personal property of which he may be possessed as a merchant carrying on trade, or in a fiduciary character, as an executor, &c., exempt from the operation of the local laws.[2]

Discussion between the American and Prussian governments, respecting the exemption of public ministers from the local jurisdiction.

The question, how far the personal effects of a public minister are liable to be seized or detained, in order to enforce the performance, on his part, of the contract of hiring of a dwelling-house, inhabited by him, has been recently discussed between the American and Prussian governments, in a case, the statement of which may serve to illustrate the subject we are treating.

The Prussian Civil Code declares, that "the lessor is entitled, as a security for the rent and other demands arising under the contract, to the rights of a *Pfandglaubiger*, upon the goods brought by the tenant upon the premises, and there remaining at the expiration of the lease."

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[1] Bynkershoek, cap. 15, 20. Vattel, liv. iv. ch. 9, § 124. Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 20. Klüber, Pt. II. tit. 2, §§ 212–214. Merlin, Répertoire, tit. *Ministre Publique*, sect. vi.

[2] Vattel, liv. iv. ch. 8, §§ 113–115. Martens, Précis, &c., liv. vii. ch. 8, § 217. Klüber, Pt. II. tit. 2, ch. 3, § 210. Merlin, sect. v. § iv. No. 6.

The same code defines the nature of the right of a creditor whose debt is thus secured. "A real right, as to a thing belonging to another, assigned to any person as security for a debt, and in virtue of which he may demand to be satisfied out of the substance of the thing itself, is called *Unterpfands-Recht.*" [1]

Under this law, the proprietor of the house in which the minister of the United States accredited at the court of Berlin resided, claimed the right of detaining the goods of the minister found on the premises at the expiration of the lease, in order to secure the payment of damages alleged to be due, on account of injuries done to the house during the contract. The Prussian government decided that the general exemption, under the law of nations, of the personal property of foreign ministers from the local jurisdiction, did not extend to this case, where, it was contended, the right of detention was created by the contract itself, and by the legal effect given to it by the local law. In thus granting to the proprietor the rights of a creditor whose debt is secured by hypothecation, (*Pfandglaubiger*,) not only in respect to the rent, but as to all other demands arising under the contract, the Prussian Civil Code confers upon him a *real right* as to all the effects of the tenant, which may be found on the premises at the expiration of the lease, by means of which he may retain them, as a security for all his claims derived from the contract.

It was stated, by the American minister, that this decision placed the members of the corps diplomatique, accredited at the Prussian court, on the same footing with the subjects of the country, as to the right which the Prussian code confers upon the lessor of distraining the goods of the tenant, to enforce the performance of the contract. The only reason alleged to justify such an exception to the general principle of exemption was, that the right in question was constituted by the contract itself. It was not pretended that such an exception had been laid down by any writer of authority on the law of nations; and this consideration alone presented a strong objection against its validity, it being notorious that all the exceptions to the principle were

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[1] Allgemeines Landrecht für die Preussischen Staaten, Pt. i. tit. 21, § 395, tit. 30, § 1.

carefully enumerated by the most esteemed public jurists. Not only is such an exception not confirmed by them, but it is expressly repelled by these writers. Nor could it be pretended that the practice of a single government, in a single case, was sufficient to create an exception to a principle which all nations regarded as sacred and inviolable.

Doubtless, by the Prussian code, and that of most other nations, the contract of hiring gives to the proprietor the right of seizing, or detaining the goods of the tenant, for the non-payment of rent, or damages incurred by injuries done to the premises. But the question here was, not what are the rights conferred by the municipal laws of the country upon the proprietor, in respect to the tenant, who is a subject of that country; but what are those rights in respect to a foreign minister, whose dwelling is a sacred asylum; whose person and property are entirely exempt from the local jurisdiction; and who can only be compelled to perform his contracts by an appeal to his own government. Here the contract of hiring constitutes, *per se*, the right in question, in this sense only, that the law furnishes to one of the parties a special remedy to compel the other to perform its stipulations. Instead of compelling the lessor to resort to a personal action against the tenant, it gives him a lien upon the goods found on the premises. This lien may be enforced against the subjects of the country, because their goods are subject to its laws and its tribunals of justice; but it cannot be enforced against foreign ministers resident in the country, because they are subject neither to the one nor to the other.

Let us suppose that the contract in question had been a bill of exchange drawn by the minister, not in the character of a merchant, but for defraying his ordinary expenses. The laws of every country, in such a case, entitle the holder of the bill to arrest the person of his debtor, in case of non-payment. It might be said, in the case supposed, that the contract itself gives the right of arresting the person, with the same reason that it was pretended, in the case in question, that it gave the right of seizing the goods of the debtor.

In fact, there was no one privilege of which a public minister might not be deprived, by the same mode of reasoning which was resorted to in order to deprive him of the exemption to which he was entitled as to his personal effects. But to deprive

him of this right alone, would be to deprive him of that independence and security which are indispensably necessary to enable him to fulfil the duties he owes to his own government. If a single article of his furniture may be seized, it may all be seized, and the minister, with his family, thus be deprived of the means of subsistence. If the sanctity of his dwelling may be violated for this purpose, it may be violated for any other. If his private property may be taken upon this pretext, the property of his government, and even the archives of the legation, may be taken upon the same pretext.

The exemption of the goods of a public minister from every species of seizure for debt, is laid down by Grotius in the following manner:

"As to what respects the personal effects (*mobilia*) of an ambassador, which are considered as belonging to his person, they are not liable to seizure, neither for the payment nor for security of a debt, either by order of a court of justice, or, as some pretend, by command of the sovereign. This, in my judgment, is the soundest opinion; for an ambassador, in order to enjoy complete security, ought to be exempt from every species of restraint, both as to his person, and as to those things which are necessary for his use. If, then, he has contracted debts, and if, which is usually the case, he has no real property (*immobilia*) in the country, he should be politely requested to pay, and if he refuses, resort must be had to his sovereign." [1]

We here perceive that this great man himself, both as a public minister and public jurist, was decidedly of opinion that the personal property of an ambassador could not be seized, either for the payment or for security of a debt; or, according to the original text,— *Ad solutionem debiti aut pignoris causâ*. Bynkershoek, in his treatise *De Foro competenti Legatorum*, cites with approbation this passage of Grotius.

Bynkershoek himself, in commenting upon the declaratory edict of the States-General of the United Provinces, of 1679, exempting foreign ministers from arrest, and their effects from attachment, for debts contracted in the country, observes:—

"The declaration of the States-General does not materially

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[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, § 9.

differ from the opinion of Grotius, which I have quoted in the preceding chapter. To which we may add, that this author states, that the effects of an ambassador cannot be seized, either for payment or for security of a debt, because they are considered as appertaining to his person. Respecting this principle Antoine Mornac reports that, in the year 1608, Henry IV. king of France, pronounced against the legality of a seizure made at Paris, for the non-payment of rent, of the goods of the Venetian ambassador. This decision has been since constantly observed in every country.

"But this may be said to be carrying the privilege too far, since the seizure of the effects of an ambassador is not so much on account of the person as to a right in the thing thus seized; a right of which the proprietor cannot be deprived by the ambassador."

This author had here anticipated the argument of the Prussian government, to which he replies as follows: —

"But far from unduly pressing the principle, by the *effects* which are spoken of in the declaration of 1679 I understood only personal effects, that is to say, those which serve for the use of ambassadors, (*id est utensilia*,) as I shall point out in that part of this treatise where it will be necessary to speak of their property. It is of these effects that I affirm, that they are not, and never have been, according to the law of nations, considered as in the nature of a pledge, to secure the payment of what is due from an ambassador. I even maintain that it is not lawful to seize them, either in order to institute a suit or to execute a judicial sentence."[1]

In his sixteenth chapter Bynkershoek explains what he means by those effects which serve for the use of ambassadors, that is, *utensilia*. In this chapter he admits that the property, both personal and real, of a public minister, may, *in some cases*, be attached, to compel him to defend a suit commenced by those who might have a claim against him: — "I say the property (*bona*) in general, whether personal or real, unless they appertain to the person of the ambassador and he possess them, as ambassador; in a word, all those things without which he may conve-

[1] Bynkershoek, de For. Legat. cap. ix. §§ 9, 10.

niently perform the functions of his office. I except, then, from the number of those goods of the ambassador which may be thus attached, corn, wine, oil, every kind of provisions, furniture, gold, toilette, ornaments, perfumes, drugs, clothing, carpets and tapestry, coaches, horses, mules, and all other things which may be comprised in the terms of the Roman law, *legati instructi et cum instrumento*."

In the following section he explains his doctrine, that certain effects of a public minister may be attached, in order to institute against him a suit, and to compel him to defend it, by showing that it is meant to be limited to the single case where the minister assumes on himself the character of a merchant, in which case the goods possessed by him, as such, may be attached for this purpose. "All these things," says he, "ought not, according to my view, to be excepted, unless they are destined for the use of the ambassador and his household. For it is not the same with corn, wine, and oil, for example, which an ambassador may have in his warehouses, for the purposes of trade; nor with horses and mules, which he may keep for the purpose of breeding and selling."

Vattel is equally explicit as to the extent of the privilege in question. The only exception he admits to the general rule is that of a public minister who engages in trade, in which case his personal goods may be attached, to compel him to answer to a suit. To this exception he annexes two conditions, the latter of which was deemed decisive of the present question.

"Let us subjoin two explanations of what has just been said: 1. In case of doubt, the respect which is due to the character of a public minister requires the most favorable interpretation for the benefit of that character. I mean to say that where there is reason to doubt whether an article is really destined to the use of the minister and his household, or whether it belongs to his stock in trade, the question must be determined in favor of the minister; otherwise there might be danger of violating his privilege. 2. When I say that the effects of a minister, which have no connection with his character, and especially those belonging to his stock in trade, may be attached, this must be understood on the supposition that the attachment is not grounded on any matter relating to his concerns as minister; as, for in-

stance, for supplies furnished to his household, for the rent of his hotel, &c."[1]

In reply to these arguments and authorities it was urged, on behalf of the Prussian government, that if, in the present case, any Prussian authority had pretended to exercise a right of jurisdiction, either over the person of the minister or his property, the solution of the question would doubtless appertain to the law of nations, and it must be determined according to the precepts of that law. But the only question in the present case could be, what are the legal rights established by the contract of hiring, between the proprietor and the tenant. To determine this question, there could be no other rule than the civil law of the country where the contract was made, and where it was to be executed, that is, in the present case, the Civil Code of Prussia.[2]

The controversy having been terminated, as between the parties, by the proprietor of the house restoring the effects which had been detained, on the payment of a reasonable compensation for the injury done to the premises, the Prussian government proposed to submit to the American government the following question:

"If a foreign diplomatic agent, accredited near the government of the United States, enters, of his own accord, and in the prescribed forms, into a contract with an American citizen; and if, under such contract, the laws of the country give to such citizen, in a given case, a *real right*, (*droit réel*) over personal property (*biens mobiliers*,) belonging to such agent: does the American government assume the right of depriving the American citizen of his *real right*, at the simple instance of the diplomatic agent relying upon his extraterritoriality?"

This question was answered on the part of the American government, by assuming the instance contemplated by the Prussian government to be that of an *implied* contract, growing out of the relation of landlord and tenant, by which the former had secured to him, under the municipal laws of the country, a tacit *hypothek*

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[1] Vattel, Droit des Gens, liv. iv. ch. 8, § 114. Mr. Wheaton to Baron de Werther. Note verbale, 15 May, 1839.

[2] Baron de Werther to Mr. Wheaton. Note verbale, 19 May, 1839.

or lien upon the furniture of the latter. It was taken for granted that there was no express hypothecation, still less any giving in *pledge*, which implies a transfer of possession by way of security for a debt.

This distinction was deemed important. There could be no doubt that, in this last case, the pawnee has a complete right, a *real right* as it was called by the Prussian government, or *jus in re*, not in the least affected by diplomatic immunities. And accordingly, this was the course pointed out to creditors by Bynkershoek, who denies them all other means of satisfying themselves out of the minister's personal goods. Of course, these words were used with the proper restriction, which confines them to the *apparatus legationis*, or such as pass under the description, of *legatus instructus et cum instrumento.*

With these distinctions and qualifications, the American government had no doubt that the view taken by its minister of this question of privilege was entirely correct. The sense of that government had been clearly expressed in the act of Congress, 1790, which includes the very case of distress for rent, among other legal remedies denied to the creditors of a foreign minister.

That this exemption was not peculiar to the statute law of this country, but was strictly *juris gentium*, appeared from the precedents mentioned by the great public jurist just cited in his treatise *De Foro Legatorum*, the great canon of this branch of public law.[1]

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[1] "Quia hæc (bona) considerantur ut personæ accessiones. . . . . Et secundum hæc Mornacius refert ad L. 2, § 3, *de Judic.* Regi Galliarum placuisse, anno 1608, *male pro locario Parisiis Venetæ reipublicæ legati mobilia fuisse retenta; et constanter ita usu est servatum deinceps ubique gentium.* Sed forte, dices, id nimium esse, quia ea mobilium detentio non tam fit ex causâ personæ, quàm *jure in re, quod locatori competit in invectis et illatis, quodque jus, lege quæsitum, legatis auferre non possit.* Sed tantum abest, ut nimium dicamus, ut vel bona quorum meminit d. Edictum anni 1679, non aliter interpretemur, quàm *bona mobilia*, id est, *utensilia*, &c. Hæc utensilia nego, ex jure gentium, pignori esse, vel unquam fuisse, quin nec capi posse, vel ad ordiendum judicium, vel ad *servandum quod nobis debetur*, vel ad exsequendam rem judicatam. Et facilè assentior Grotio, si de *utensilibus* accipias, quæ ipse dixit, ea nempe pignoris causâ capi non posse, *nec per judiciorum ordinem, nec manu regiâ*, explosâ sic distinctione, quæ aliis olim, sed sine ratione, placuerat." *De For. Legat.* cap. ix.

Compare the catalogue of the personal goods so privileged, *id.* cap. xvi.

Besides this conclusive authority upon the very point in question, Bynkershoek states the principle (out of Grotius) that the personal goods of a foreign minister cannot be taken by way of distress or pledge, and gives it the sanction of his most emphatic assent.[1] Indeed the whole scope of the treatise referred to, went to establish this very doctrine.

But to consider it on principle. Three several questions would arise upon the inquiry propounded by the Prussian government. 1st. Is the landlord's right, in such a case, a *real right* properly so called? 2d. Admitting it to be so, can it be asserted, consistently with Prussian municipal law, against a foreign minister who has not voluntarily parted with his possession, on an express contract, to secure payment of rent or damages? 3d. Supposing the municipal law of Prussia to contemplate the case of a foreign minister, can that law be enforced, in such a case, consistently with the law of nations?

There was, in all systems of jurisprudence, great difficulty in settling the legal category of the landlord's right. Pledge, although not property, is certainly a real right; but a mere lien or hypothek, in which there is no transfer of possession, is not a pledge. In England, and in the United States, the right of landlords was originally a mere lien, reducible by distress into a right of pledge. In Scotland the same right is sometimes called a right of property, and sometimes a mere hypothek, springing out of a tacit contract. Without pretending to determine precisely whether its origin ought to be referred to the one or the other principle, (neither perhaps being fully adequate to account for all its effects,) it is considered by the best writers as a right of hypothek, convertible by a certain legal process into a real right of pledge.

If this be a proper view of the subject, there was surely an end of the question: for the *process* of conversion is as much

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[1] "Bona quoque legati mobilia, et quæ proinde habeatur personæ accessio, *pignoris causâ*, *aut ad solutionem debiti*, *capi non posse*, nec per judiciorum ordinem, nec, quod quidam volunt, manu regiâ, verius est: nam omnis coactio a legato abesse debet, tam quæ res ei necessarias, quàm quæ personam tangit, quo plena ei sit securitas." Bynkershoek, de For. Legat. cap. viii. Grotius, de Jur. Bel. ac Pac., lib. ii. cap. 18, § 19.

the exercise of jurisdiction, as the levying an execution; and the public minister is exempt from all jurisdiction whatever.

It was true that all hypothecations, or privileges upon property, are classed by some writers under the head of real rights, but this was by no means conclusive of the case under consideration. In a conflict of rights, this might entitle the privileged creditor to *preference* in the distribution of an inadequate fund, but the question was, how was he to assert that preference? By means of judicial process? If so, he is without remedy against one not subject to the jurisdiction, except by open violence, which, of course, is not classed among rights. Accordingly, privileges, and liens by mere operation of law, are usually considered as matters of *remedy*, not of *right;* as belonging to the *lex fori*, not to the essence of the contract.[1]

It might, therefore, be considered as doubtful, *a priori*, whether, by the Prussian code, the right of the landlord is a real right, to the effect, at least, of putting it on the footing of property transferred by contract, for that was the argument.

2d. But suppose this to be the usual effect, by operation of law, of the contract between landlord and tenant, does it hold as against one not subject to the law; not amenable to the jurisdiction; not, in legal contemplation, residing within the country of the contract?

By the supposition, it was an *incident* in law of the relation between the landlord and his tenant, and it turns upon an *implied* contract. It was supposed that the tenant agreed to hire the house on the usual conditions; but one of them was, that if he failed to pay the rent, or indemnify for damages done to the premises, the landlord should have a remedy by distress. It was, therefore, inferred that it was not the law, or the judge, but the tenant himself, who had transferred, *quasi contractu*, this interest in his own property. But if this reasoning was correct, why should it not apply in the case of arrest and holding to bail? or in any case of attachment? The consent might as well be implied here, as in favor of a landlord. Indeed, the same implication might as reasonably be extended to all laws whatever, and foreign ministers thus be held universally subject by con-

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[1] Story, Conflict of Laws, §§ 423–456, 2d ed.

tract to the municipal jurisdiction. The presumption implied in the contract under the law of the place, and binding on the parties subject to the jurisdiction is repelled by the immunity and extraterritoriality of the public minister. He that enters into a contract with another knows, or ought to know, his condition. So says Ulpian, (l. 19, pref. de R. J.,) and the landlord who lets his house to a foreign minister, waives his remedy under the law from which he knows that minister is exempt.

The American government was therefore inclined, in the absence of any authority to the contrary, to think that the Prussian municipal law, properly interpreted, did not, in fact, authorize any such pretension as that set up by the landlord, in the present instance. But even supposing it did authorize the pretension, it ought no more to derogate from the established law of nations in this case, than in that of personal arrest. The authorities cited above seemed to the American government entirely conclusive as to this point; and it was greatly confirmed in this view of the subject by the act of Congress declaratory of the law of nations, and by the opinion of other governments. In short, all the reasons on which diplomatic immunities have been asserted, and are now universally allowed, seem just as applicable to the case of liens and hypothecations in favor of landlords, as to remedies of any other kind. Indeed, nothing could afford a better practical illustration of this than the attempt of the landlord in the present case, by means of his pretended lien, to force the minister to pay damages assessed at his discretion, for an injury proved only by his own allegation.[1]

The Prussian government declared, that its opinion upon the point in controversy remained unchanged by the above reasoning, and the authorities adduced in support of it. According to its view, the question was not, whether the lessor had a right to retain a portion of the effects belonging to the lessee, and found on the premises at the expiration of the contract, as security for the damages incurred by its breach; but whether the lessor, by exerting his right of retention, had committed a violation of the

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[1] Mr. Legaré's Despatch to Mr. Wheaton, 9th June, 1843.

privileges of diplomatic agents, or, at least, a punishable act; and if, for this reason, he could be compelled, summarily, and before the competent judge had pronounced upon his claim, to restore the effects thus retained. This last question being resolved negatively, the decision of the first must necessarily be reserved to the competent tribunals.

The privilege of extraterritoriality consists in the right of the diplomatic agent to be exempt from all dependence on the sovereign power of the country, near the government of which he is accredited. It follows, that the State cannot exercise against him any act of jurisdiction whatsoever, and as by a natural consequence of this principle, the tribunals of the country have, in general, no right to take cognizance of controversies in which foreign ministers are concerned, neither are they authorized, in the particular case of a controversy arising out of a contract of hiring, to ordain the seizure of the effects of a public minister.

If, then, the privilege of extraterritoriality regards only the relations which subsist between the diplomatic agent and the sovereign power of the country where he resides, it is also evident that a violation of this privilege can only be committed by the public authorities of that country, and not by a private person. The legal relations of the subjects of the country are in no respect *directly* changed by the principle of extraterritoriality; it is only *indirectly* that this principle can operate upon those relations; so that in respect to citizens' controversies, the subject is not entitled to invoke the interposition of the authorities of his own country against the foreign minister upon whom he may have a claim for redress, and if he would commence a suit against him, he must resort to the tribunals of the minister's country. If, on the other hand, the subject can do himself justice, without having recourse to the authorities of his own country, his position in respect to the foreign minister is absolutely the same as if the controversy had arisen with one of his own fellow citizens.

It was hardly necessary to observe that, in such a case, the party must keep within the limits of what is generally permitted. If he should resort to violence, he would render himself guilty of an infraction of the law, and would be punishable in the

same manner as if the adverse party were an inhabitant of the country.

In the controversy now in question, no authority dependent on the Prussian government had participated, either directly or indirectly, in the seizure of the effects of the American minister; the proprietor of the house having retained them by his own proper act, there was then no violation of the privilege of extraterritoriality. There was no proof of any act of violence having been committed by him, and the mere act of retention could not be considered as an unlawful act.

On prineiple, every proprietor of a house, even where it is let to another person, remains in possession of his property. It follows, that the effects brought on to the premises by the tenant may be considered, in some respects, as in possession of the landlord. It is for this reason that the municipal law of Prussia, as well as that of most other European States, gives to the landlord a lien upon the goods of the tenant, as a security for the payment of the rent. The question how far this right, founded upon the positive law of a particular country, can be exerted against a foreign minister, may be dismissed from consideration; since the act of retention cannot be regarded as an unlawful and punishable act, and, in such a case, it belongs to the tribunals of justice to pronounce judgment upon the rights which the landlord may have acquired by the retention.[1] (*a*)

§ 18. Duties and taxes.

The person and personal effects of the minister are not liable to taxation. He is exempt from the payment of duties on the importation of articles for his own personal use and that of his family. But this latter exemption is, at present,

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[1] Baron de Bulow's Letter to Mr. Wheaton, 5th July, 1844.

See an able review of the above controversy by M. Fœlix, the learned editor of the Revue du Droit Français et Étranger, tome ii. p. 31.

(*a*) [In the case of an attaché to the French legation the opinion of the Attorney-General was, that neither a landlord nor a taverner, under the color of a lien, can forcibly take from an ambassador his chest or trunk, whether it contains his wardrobe or other articles of mere personal convenience, or whether it contains the instructions or the archives of his legation. Neither the law of nations nor the law of Congress knows any difference. While the Secretary of State can take no legal measures, the law furnishes the attaché the most ample protection. Opinions of Attorneys-General, ed. 1852, vol. v. p. 70. Mr. Toucey, Attorney-General, to the Secretary of State, February 13, 1849.]

by the usage of most nations, limited to a fixed sum during the continuance of the mission. He is liable to the payment of tolls and postages. The hotel in which he resides, though exempt from the quartering of troops, is subject to taxation, in common with the other real property of the country, whether it belongs to him or to his government. And though, in general, his house is inviolable, and cannot be entered, without his permission, by police, custom-house, or excise officers, yet the abuse of this privilege, by which it was converted in some countries into an asylum for fugitives from justice, has caused it to be very much restrained by the recent usage of nations.[1]

§ 19. Messengers and couriers.

The practice of nations has also extended the inviolability of public ministers to the messengers and couriers, sent with despatches to or from the legations established in different countries. They are exempt from every species of visitation and search, in passing through the territories of those powers with whom their own government is in amity. For the purpose of giving effect to this exemption, they must be provided with passports from their own government, attesting their official character; and, in the case of despatches sent by sea, the vessel or *aviso* must also be provided with a commission or pass. In time of war, a special arrangement, by means of a cartel or flag of truce, furnished with passports, not only from their own government, but from its enemy, is necessary, for the purpose of securing these despatch vessels from interruption, as between the belligerent powers. But an ambassador, or other public minister, resident in a neutral country for the purpose of preserving the relations of peace and amity between the neutral State and his own government, has a right freely to send his despatches in a neutral vessel, which cannot lawfully be interrupted by the cruisers of a power at war with his own country.[2]

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1 Vattel, liv. iv. ch. 9, §§ 117, 118. Martens, Précis, &c., liv. vii. ch. 5, § 220. Manuel Diplomatique, ch. 3, §§ 30, 31. Merlin, Répertoire, tit. *Ministre Publique*, sect. v. § 5, Nos. 2, 3.

2 Vattel, liv. iv. ch. 9, § 123. Martens, Précis, &c., liv. vii. ch. 13, § 250. Robinson's Adm. Rep. vol. vi. p. 466. The Caroline. [This case is distinguished by Sir W. Scott from the carrying, by a neutral, of despatches from the governor of an enemy's colony to the government at home, which is a ground of condemnation. Robinson's Adm. Rep. vol. vi. p. 441. The Atalanta.]

§ 20. Public minister passing through the territory of another State than that to which he is accredited.

The opinion of public jurists appears to be somewhat divided upon the question of the respect and protection to which a public minister is entitled, in passing through the territories of a State other than that to which he is accredited. The inviolability of ambassadors, under the law of nations, is understood by Grotius and Bynkershoek, among others, as binding only on those to whom they are sent, and by whom they are received.[1] Wicquefort, in particular, who has ever been considered as the stoutest champion of ambassadorial rights, asserts that the assassination of the ministers of the French king, Francis I., in the territories of the Emperor Charles V., though an atrocious murder, was no breach of the law of nations, as to the privileges of ambassadors. It might be regarded as a violation of the right of innocent passage, aggravated by the circumstance of the dignified character of the persons on whom the crime was committed, — and might even be considered a just cause of war against the emperor, without involving the question of protection in the character of ambassador, which arises exclusively from a legal presumption which can only exist between the sovereigns from and to whom he is sent.[2]

Vattel, on the other hand, states that passports are necessary to an ambassador, in passing through different territories on his way to his destined post, in order to make known his public character. It is true that the sovereign to whom he is sent is more especially bound to cause to be respected the rights attached to that character; but he is not the less entitled to be treated, in the territory of a third power, with the respect due to the envoy of a friendly sovereign. He is, above all, entitled to enjoy complete personal security; to injure and insult him would be to injure and insult his sovereign and entire nation: to arrest him, or commit any other act of violence against his person, would be to infringe the rights of legation which belong to every sovereign. Francis I. was therefore fully justified in complaining of the assassination of his ambassadors, and, as

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[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 18, § 5. Bynkershoek, de Foro Comp. Legat. cap. ix. § 7.

[2] Wicquefort, de l'Ambassadeur, liv. i. § 29, pp. 433–439.

Charles V. refused satisfaction, in declaring war against him. "If an innocent passage, with complete security, is due to a private individual, with still more reason is it due to the public minister of a sovereign, who is executing the orders of his master, and travelling on the business of his nation. I say *an innocent passage;* for if the journey of the minister is liable to just suspicion, as to its motives and objects; if the sovereign, through whose territories he is about to pass, has reason to apprehend that he may abuse the liberty of entering them for sinister purposes, he may refuse the passage. But he cannot maltreat him, or suffer others to maltreat him. If he has not sufficient reasons for refusing the passage, he may take such precautions as are necessary to prevent the privilege being abused by the minister."[1]

He afterwards limits this right of passage to the ambassadors of sovereigns, with whom the State through which the attempt to pass is, at the time, in the relations of peace and amity; and adduces, in support of this limitation of the right, the case of Marshal Belle-Isle, French ambassador at the Prussian court, in 1744, (France and Great Britain being then at war,) who, in attempting to pass through Hanover, was arrested and carried off a prisoner to England.[2]

Bynkershoek maintains that ambassadors, passing through the territories of another State than that to which they are accredited, are amenable to the local jurisdiction, both civil and criminal, in the same manner with other aliens, who owe a temporary allegiance to the State. He interprets the edict of the States-General, of 1679, exempting from arrest "the persons, domestics, and effects of ambassadors, *hier te lande komende, residerende of passerende*," as extending only to those public ministers actually accredited to their High Mightinesses. He considers the last-mentioned term *passerende* as referring not to those who, coming from abroad, merely pass through the territories of the State in order to proceed to another country, but to those only who are about to leave the State where they have been resident as ministers accredited to its government.[3]

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1 Vattel, Droit des Gens, liv. iv. ch. 7, §§ 84, 85.

2 Ch. de Martens, Causes Célèbres du Droit des Gens, tome i. p. 310.

3 Bynkershoek, de For. Legat. cap. ix. Wheaton, Hist. Law of Nations, p. 243.

This appears to Merlin to be a forced interpretation. "The word *passer* in French, and *passerende* in Dutch," says he, "was never used to designate a person returning from a given place; but is applicable to one who, having arrived at that place, does not stop there, but proceeds on to another. We must, therefore, conclude that the law in question attributes to ambassadors who merely pass through the United Provinces the same independence with those who are there resident. If it be objected, as Bynkershoek does object, that the States-General (that is, the authors of this very law) caused to be arrested, in 1717, the Baron de Gortz, ambassador of Sweden at the court of London, at the request of George I., against the security of whose crown he had been plotting, the answer to this example is furnished by Bynkershoek himself. 'The only reason,' says he, 'alleged by the States-General for this proceeding was, that this ambassador had not presented to them his letters of credence.' This reason, (continues Merlin,) is not the less conclusive for being the only one alleged by the States-General. When it is said that an ambassador is entitled, in the territories through which he merely passes, to the independence belonging to his public character, it must be understood with this qualification, that he travels *as an ambassador;* that is to say, after having caused himself to be announced as such, and having obtained permission to pass in that character. This permission places the sovereign, by whom it has been granted, under the same obligation as if the public minister had been accredited to and received by him. Without this permission, the ambassador must be considered as an ordinary traveller, and there is nothing to prevent his being arrested for the same causes which would justify the arrest of a private individual." [1]

To these observations of the learned and accurate Merlin it may be added, that the inviolability of a public minister in this case depends upon the same principle with that of his sovereign, coming into the territory of a friendly State by the permission, express or implied, of the local government. Both are equally entitled to the protection of that government, against every act of violence and every species of restraint, inconsistent with their

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1 Merlin, Répertoire, tit. *Ministre Publique*, sect. v. § 3, Nos. 4, 12.

sacred character. We have used the term *permission, express* or *implied;* because a public minister accredited to one country who enters the territory of another, making known his official character in the usual manner, is as much entitled to avail himself of the permission which is implied from the absence of any prohibition, as would be the sovereign himself in a similar case.[1]

§ 21. Freedom of religious worship.

A minister resident in a foreign country is entitled to the privilege of religious worship in his own private chapel, according to the peculiar forms of his national faith, although it may not be generally tolerated by the laws of the State where he resides. Ever since the epoch of the Reformation, this privilege has been secured, by convention or usage, between the Catholic and Protestant nations of Europe. It is also enjoyed by the public ministers and consuls from the Christian powers in Turkey and the Barbary States. The increasing spirit of religious freedom and liberality has gradually extended this privilege to the establishment, in most countries, of public chapels, attached to the different foreign embassies, in which not only foreigners of the same nation, but even natives of the country of the same religion, are allowed the free exercise of their peculiar worship. This does not, in general, extend to public processions, the use of bells, or other external rites celebrated beyond the walls of the chapel.[2]

§ 22. Consuls not entitled to the peculiar privileges of public ministers.

Consuls are not public ministers. Whatever protection they may be entitled to in the discharge of their official duties, and whatever special privileges may be conferred upon them by the local laws and usages, or by international compact, they are not entitled, by the general law of nations, to the peculiar immunities of ambassadors. No State is bound to permit the residence of foreign consuls, unless it has stipulated by convention to receive them. They are to be approved and admitted by the local sovereign, and, if guilty of illegal or improper conduct, are liable to have the exequatur, which is granted them, withdrawn, and may be

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[1] Vide supra, Pt. II. ch. 2, § 9, p. 143.

[2] Vattel, liv. iv. ch. 7, § 104. Martens, Précis, &c., liv. vii. ch. 6, §§ 222–226. Klüber, Droit des Gens Moderne de l'Europe, Pt. II. tit. ii. ch. 3, §§ 215, 216.

punished by the laws of the State where they reside, or sent back to their own country, at the discretion of the government which they have offended. In civil and criminal cases they are subject to the local law, in the same manner with other foreign residents owing a temporary allegiance to the State.[1] (*a*)

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[1] Wicquefort, de l'Ambassadeur, liv. i. § 5. Bynkershoek, cap. 10. Martens, Précis, &c., liv. iv. ch. 3, § 148. Kent's Comment. on American Law, vol. i. pp. 43–45, 5th edit. Fœlix, Droit International Privé, § 191.

(*a*) [Vide supra, Pt. II. c. 2, § 11, p. 167, note, also the Treaty of the United States with Borneo, concluded at Bruni, 23d June, 1850, and promulgated by the President, the 12th of July, 1854; which extends the judicial power of the American consuls, beyond the concessions heretofore made to us, in any of our treaties with the nations of the East. By it our consuls have exclusive jurisdiction, without any interference, molestation, or hindrance, on the part of any of the authorities of Borneo, in all cases where American citizens are accused of crime, and in all cases where disputes or differences may arise between American citizens or between American citizens and the subjects of the Sultan of Borneo, or between American citizens and the citizens or subjects of any other foreign power in the dominions of Borneo. Treaties of the United States, 1853–4, p. 90.

The following opinion of the Attorney-General, Mr. Cushing, which has been transmitted with the sanction of the Department of State to the consuls of the United States, though it, also, touches points discussed, under other heads, in this treatise, is inserted in this place, as elucidating the *status* of consuls under the law of nations. It was prepared in answer to a communication from the Secretary of State, which states that it is the practice, to some extent, of the consuls of the United States abroad to marry parties, either citizens of the United States or not, and this without observance of the laws of the particular place regarding marriage, — and suggests the inquiry whether such marriages are valid in the United States, either as to the personal *status* of the parties themselves and their issue, or as to any of the rights of property depending on the matrimonial relation.

"This inquiry belongs to international law *private*, as distinguished from international law *public;* that is to say, it regards, not the relations of nations among themselves, but the relations of individuals to the laws, civil or criminal, of different nations. Fœlix, Dr. Int. Privé, tit. prél.

"The different States of Christendom are combined, by religious faith, by civilization, by science and art, by conventions, and by usages or ideas of right having the moral force of law, into a community of nations, each politically sovereign and independent of the other, but all admitting much interchange of legal rights or duties. Vattel, Droit des Gens, Prél. s. 11; Wheaton's Elements, p. 40, 3d ed.; Garden, Code Dip. de l'Europe, tom. i. int. p. 3.

"As between themselves, the general rule of public law is that each independent State is sovereign in itself, and has more or less complete jurisdiction of all persons being, matters happening, contracts made, or acts done, within its own

§ 23. Termination of public mission.

The mission of a foreign minister resident at a foreign court, or at a Congress of ambassadors, may terminate during his life in one of the following modes: —

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territory. Klüber, Droit des Gens, s. 21 and *passim;* Story's Conflict of Laws, ch. 2.

"I say, more or less complete; because, although each nation possesses its territory as its own, and exercises jurisdiction within itself, not only as to persons, whether subjects or foreigners, their acts and their property therein, and in general neither claims itself, nor concedes to others, external jurisdiction; yet each yields to the other certain reciprocal rights within itself, which are sometimes denominated by the civil law term of servitudes of the public law or law of nations. Martens, Précis, s. 83.

"These privileges, servitudes, or easements of public law have grown up either by express convention, or by usage founded on consent. Per Ch. J. Marshall, The Exchange, vii. Cranch, p. 136. Among them are the effect, which, in certain cases, one State concedes to the laws of another in regard to contracts made in the latter, and the reciprocal rights conceded of personal residence or commercial intercourse, and of the interchange of ministers and consuls, which concessions modify to a certain degree the hypothetical completeness of the internal sovereignty of each nation.

"Hence, in all the discussions of private international right, the fundamental and all-pervading distinction between the statute personal, or the laws of one's own proper domicile, and the statute real, or the laws which are independent of the person, and which regulate in a foreign country his acts or interests irrespective of his domicile. The personal statute is transitory, and follows the person; the real statute is chiefly confined to things, which it controls only in the *locus rei sitæ*, or the given territory. Dalloz, Dict. Juris. s. v. Loi Pers.; Proudhon, Des Personnes, tom. i. p. 8.

"To the regular jurisdiction, however, of each country over persons, things, and acts, being or done within it, there exist, by received public law, certain absolute exceptions. These exceptions are the several cases of exterritoriality: that is, the various conditions in which a person, though abroad, is exempt from the foreign jurisdiction, and is deemed to be still within the territory and jurisdiction of his own country.

"The doctrine of exterritoriality is denounced by some speculative publicists as if it were a mere fiction of law. See Pinheiro Ferreira, Droit Public, tom. ii. p. 197. This view of the matter is superficial, for it is only a cavil as to the name; and erroneous, because it argues upon the name, and not the thing which it represents.

"The word 'exterritoriality' is a sufficient definite technical designation for the peculiarity of legal condition already defined as attaching to certain persons in a foreign country, to wit: the case of an actual sovereign of an independent State, his person, suite, residence, and furniture, while he resides or sojourns peaceably in a foreign country; a foreign army, whether in peace or war; a ship of war generally, and sometimes a merchant ship in a foreign port, and either of them

1. By the expiration of the period fixed for the duration of the mission; or, where the minister is constituted *ad interim* only, by

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on the high seas in all circumstances; and a foreign ambassador. Wheaton's El. p. 139.

"In all these cases, and expressly in that of foreign ministers, the privilege of exterritoriality extends to the residence as well as the person of the foreign minister, and to certain legal acts performed in his presence. Vattel, l. 8, ch. 7, 8, 9; Klüber, s. 204; Martens, Précis, l. 7, ch. 5; Fœlix, liv. 2, tit. 2, ch. 2, s. 4; Ch. de Martens, Guide Diplomatique, ch. 5.

"Such are the rights of an ambassador or other foreign minister. But, although consuls are not merely commercial agents, as many authors assert. (Wicquefort, Ambas., vol. i. p. 133; Bynkersh. de F. Legat., p. 165; Wildman's Institutes, vol. i. p. 130); and although they undoubtedly have certain of the qualities and some of the rights of a foreign minister (see De Cussy, Réglements Consulaires, sec. 7); still it is undeniable that they do not enjoy the privileges of exterritoriality, according to the rules of public law received in the United States. Clark *v.* Cretico, i. Taunton, 106; The Anne, iii. Wheaton, 446; United States *v.* Ravara, ii. Dallas, 297; Viveash *v.* Becker, iii. Maule & Sel. 284; Barbuit's case, Cases Temp. Talbot, 281; Commonwealth *v.* Korsloff, v. Serg. & R., 545; Durand *v.* Halback, i. Miles, 46; Davis *v.* Packhard, vii. Peters, 276; S. C., vi. Wend., 327; S. C., x. Wend., 50; Flynn *v.* Stoughton, v. Barb. S. C. R., 115; State *v.* De la Font, ii. Nott & McCord, 217; Mannhardt *v.* Soderstrom, i. Bin., 138; Hall *v.* Young, iii. Pick., 80; Sartori *v.* Hamilton, i. Green's R., 107.

"In all the adjudged cases above cited, it is either expressly ruled, or the point presented assumes, that consuls are subject to the local jurisdiction. The same doctrine is recognized in the modern law treatises of most authority, whether in the United States or in Great Britain. Wheaton's Elements, p. 293; Kent's Com., vol. i. p. 43; Wildman's Inst., vol. i. p. 130; Flynn's Brit. Consuls, ch. 5.

"Notwithstanding the somewhat vague speculations of Vattel and some other continental authors on the question whether consuls are quasi ministers or not, (Vattel, Droit des Gens, l. iv. ch. 8; De Cussy Réglements Consulaires, sec. 6; Moreuil, Agents Consulaires, p. 348; Borel, Des Consuls, ch. 3); it is now fully established by judicial decisions on the Continent, and by the opinions of the best modern authorities there, that consuls do not enjoy the diplomatic privileges accorded to the ministers of foreign powers; that in their personal affairs they are justiciable by the local tribunals for offences, and subject to the same recourse of execution as other resident foreigners; and that they cannot pretend to the same personal inviolability and exemption from jurisdiction as foreign ministers enjoy by the law of nations. Fœlix, l. ii. tit. 2, ch. 2, s. 4; Dalloz, Dic. de Jurispr., tit. Agents Diplomatiques, No. 35; Ch. de Martens, Guide Diplomat., s. 83.

"In truth, all the obscurity and contradiction as to this point in different authors arise from the fact that consuls do unquestionably enjoy certain privileges of exemption from local political obligation; but still these privileges are limited, and fall very far short of the right of exterritoriality. Massé, Droit Commercial, tom. i. No. 438, 439.

the return of the ordinary minister to his post. In either of these cases a formal recall is unnecessary.

"Thus, in the United States, consuls have a right, by the Constitution, to the jurisdiction of the federal courts as against those of States. They are privileged from political or military service and from personal taxation. In some cases we have by treaty given to consuls, when they are not proprietors in the country, and do not engage in commerce, a domiciliary and personal immunity beyond what they possess by the general public law; and the extreme point to which these privileges have been carried in any instance may be seen in the Consular Convention of the 23d of February, 1853, between the United States and France. Session Acts, 1853-4, p. 114.

"Having premised this explanation of the exact *status* of consuls by the law of nations, it remains for me to deduce from the general doctrine the particular conclusions applicable to the special subject of inquiry.

"In regard to the contract of marriage, the general principle in the United States is that, as between persons *sui juris*, marriage is to be determined by the law of the place where it is celebrated. If valid there, then, although the parties be transient persons, and the marriage not in form or substance valid according to the law of their domicile, still it is valid everywhere: — with some exceptions, *perhaps*, of questions of incest and polygamy. If invalid where celebrated, it is invalid everywhere. Story's Conflict of Laws, s. 113; Bishop on Marriage, s. 125.

"The only exceptions to this last proposition, namely, that marriages not valid by the *lex loci contractus* are not valid anywhere else, are, first, in favor of marriage, when parties are sojourning in a foreign country where the law is such that it is impossible for them to contract lawful marriage under it. Secondly, in certain cases in which, in some foreign countries, the local law recognizes a marriage as valid when contracted according to the law of domicile. Thirdly, where the law of the country goes with the parties, that is, in the contingency of their personal exterritoriality, as in the case of an army and its followers invading or taking possession of a foreign country, (Ruding *v.* Smith, ii. Hag. C. R., 371, — Huber. Prælec., J. C. de Con. Leg. l. i., tit. 3, s. 10; J. Voet. in Dig., l. xxii. tit. 2); and, perhaps, of an army *in transitu* through a friendly State, (Wheaton's El., p. 140,) and of a foreign ship of war in the ports of the nation. The Exchange, vii. Cranch, p. 136.

"It follows by necessary consequence, save in the excepted cases enumerated, that a marriage, celebrated in any given place, must be celebrated according to the law of the place, and by a person whom those laws designate, unless the person by whom, or the premises in which, it is celebrated, possess the privileges of exterritoriality.

"Therefore it may be, according to the opinion of Lord Stowell, that the presence of a foreign sovereign sojourning in a friendly country, or that of his minister plenipotentiary, or the act of a clergyman in the chapel or hotel of such sovereign, or his ambassador, may give legality to marriage between subjects of

2. When the object of the mission is fulfilled, as in the case of embassies of mere ceremony; or, where the mission is special, and the object of the negotiation is attained or has failed.

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his or members of his suite. Ruding *v.* Smith, ii. Haggard's C. R., 371; Prentiss *v.* Tudor, i. Hagg. C. R., 136; i. Burge on Col. &. F. Laws, p. 168.

"But even such right of a foreign sovereign or his ambassador to celebrate a marriage, if it exist, applies only to his subjects, countrymen, or suite. Such persons would be married according to the law of their domicile, or that of the sovereign or ambassador in whose service they are, on the assumption that for all the purposes of legal right their domicile goes with them, and that they are still at home, and in point of law are not in the foreign country where the marriage is in fact celebrated. A marriage celebrated by such sovereign or his ambassador in a foreign country, between citizens of that country, or foreigners residing there or sojourning there, would derive no force from him: it would be null and void, unless legal according to the law of the place.

"Consuls, it is still more evident, have no shadow of power to celebrate marriage between foreigners. Nor can they between their own countrymen, unless expressly authorized by the law of their own country: because, according to the law of nations, they have not the privileges of exterritoriality, like an ambassador.

"That American consuls have no such power is clear, because it is not given them by any act of Congress, nor by the common law of marriage as understood in the several States. See Kent *v.* Burgess, xi. Simons, 361. And marriage, in the United States, is not a federal question, but one of the resort of the individual States. Bishop on Marriage, *passim*. Hence it is impossible for me to doubt:

"First, that marriages celebrated by a consul of the United States in any foreign country of Christendom, between citizens of the United States, would have no legal effect here, save in one of the exceptional cases above stated of its being impossible for the parties to marry by the *lex loci*.

"And, secondly, that marriages, celebrated by a consul of the United States in a foreign country, between parties not citizens of the United States, would have no legal effect here, unless in case they be recognized expressly as valid by the law of the place of contract.

"In countries where the mere consent of the parties, followed by copulation, constitutes marriage, as in Scotland, (McAdam *v.* Walker, i. Dow's R., 148; Dalrymple *v.* Dalrymple, ii. Hagg. C. R., 97,) and where the presence and testimony of any person whatever suffice to prove the consent, there a marriage contracted before a foreign consul might be valid, not because he is consul, but because the consent makes the marriage.

"But, in most countries of Europe, specific forms of law are to be followed, without which there can be no valid marriage; and as it appears that the marriages, which the consuls of the United States have celebrated abroad, have in most cases been celebrated between persons collected at some seaport for the purpose of emigration, and who are not only foreigners as regards the United States,

3. By the recall of the minister.
4. By the decease or abdication of his own sovereign, or the

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but foreigners also as regards the place in which the marriage is celebrated, it becomes material to consider the question, in the sense of this impediment of double alienage, in its relation to the law matrimonial of the United States.

"The general rule of our law is to ascribe validity to marriages when they are valid at the place of celebration.

"If the parties to the marriage are at the time actually in their own proper domicile, as in the case of Spaniards domiciled in Barcelona, and married there, it is clear that the local jurisdiction is absolute and complete, and that a consul of the United States has no more right to celebrate a marriage between such parties there than he has to undertake the duties of Captain-General.

"Suppose, however, that the parties are foreigners to the foreign place, and at the same time not citizens of the United States?

"The other governments of Christendom, and especially those of Europe, are, it is notorious, much more exacting and punctilious than the United States in the application of their own laws of personal *status* to their own subjects when absent from their country.

"We may not regard this here, but they do among themselves; and therefore it is important to look at the legal bearings of a marriage celebrated in one European country between the subjects of some other government of Europe.

"The general rule there is, that the civil obligations of a person follow him into a foreign country, save that in some countries forms are prescribed, according to which a subject may relieve himself of his allegiance to his natural sovereign and the consequent civil obligations. It is believed that many of the persons, who emigrate from Europe to the United States, have not taken these preliminary steps; and therefore, until they shall have acquired a new domicile in the United States, and while they are sojourning in some other foreign country on their way for, and previous to, their embarkation, they must of necessity be still subject to the law of their domicile in so far as this law is respected by the country of their transit or of their temporary sojourn; and the question of the validity of their marriage there by a foreign consul must depend on this legal condition of the parties in the countries of Europe.

"In order to appreciate the legal relations in Europe of a marriage between parties foreign to the place of marriage, we may take, as a convenient example, the state of the law in France.

"In France, of course, all Frenchmen must conform to the precise provisions of their own law; nay, as a general rule, if they marry abroad, still they must observe certain of the conditions of the Code Civil, in order to give effect to the marriage in France. Code Civil, No. 170; Fœlix, *ubi supra*, No. 88.

"In regard to such foreign marriages of Frenchmen it has been adjudged by the courts of that country, that, — 1. Frenchmen long established in a foreign country, and who have reserved no habitation and have no domicile there, are not held to the forms of public notice in France required by the code. Dalloz, Dict. Jur., Mariage, No. 374.

sovereign to whom he is accredited. In either of these cases, it is necessary that his letters of credence should be renewed; which,

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"2. Generally, all acts appertaining to the civil condition of Frenchmen abroad may be proved by the modes of proof practised in the foreign country; and, therefore, a marriage may be proved by witnesses, or by the certificate of a diocesan, when celebrated in a foreign country where no registers of civil condition exist conformable to the code. Dalloz, *ubi supra*, Nos. 346–356.

"3. There are no differences of opinion as to the point that Frenchmen, who marry abroad, must conform to the provisions of the code as to capacity, age, consent, and other conditions of substance; but there are contradictory decisions and opinions as to the point, whether it be or not essential to the validity of such marriage that there should have been previous publication of bans in France; and whether, if this be a radical defect, it is curable or not; (Dalloz, *ubi supra*, Nos. 357–375;) because the article of the code, (No. 170,) which legalizes a marriage contracted between Frenchmen abroad according to the forms used in the foreign country, adds, provided (*pourvu*) the marriage be preceded by the publication of bans, and do not contravene the other conditions of law, as prescribed by the 1st and 2d chapters of the 5th title of the code. See Toullier, Droit Civil, tom. 1, No. 576–579.

"4. The code (art. 47 and 48) provides that any civil act of Frenchmen abroad shall be valid if it be drawn up in pursuance of the forms of the place, according to the rule *locus regit actum;* or if it has been received conformably to the laws by the diplomatic agents or consuls of France. It has been doubted whether this applies to marriage; though the better opinion is that it does. Dalloz, *ubi supra*, No. 362–363; Toullier, Droit Civil, tom. i, No. 360; Merlin, Répert., Mariage, p. 641. It is said, however, that if one of the parties to a marriage by a French consul abroad is French and the other not, then the marriage is null, because the consul has no jurisdiction as to the party not French, and the marriage may be attacked by either party. Dalloz, *ubi supra*, No. 365. 366. In one of the cases where this point was decided, the parties possessed an act of marriage, with twenty years cohabitation, and two children. Proudhon, Tr. des Personnes, tom. i. note *a*.

"5. Finally, a marriage contracted in France by a foreigner according to the exterior forms prescribed by the law would be null, of intrinsic nullity, if the foreigner infringed any of the prohibitions of his statute personal, that is, of the personal law of his domicile. Fœlix, *ubi supra*, s. 88.

"These views might be extended in detail to other countries of Europe.

"Thus, in the Dutch Netherlands, in addition to the conditions of competency and of publication of bans, there must be a legal contract before the proper magistrate, without which the marriage is a nullity. Van der Linden, by Henry, p. 83. As to this, no exception is made in favor of any persons whatever, being foreigners, or *in itinere*, or otherwise. See Ruding *v.* Smith, ii. Hag. C. R., 371, note.

"So, in Spain, marriage must be solemnized by prescribed rule, that is, through the intervention of the parish priest, or other clergyman with license of his ordinary, according to the articles of the Council of Trent concerning the

in the former instance, is sometimes done in the letter of notification written by the successor of the deceased sovereign to the

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reformation of matrimony. Tapia, Febrero Novis., lib. i. cap. 2; Sala, Derecho real de España, lib. i. tit. 4.

"It is unnecessary to extend these examples. Suffice it to say, that in some countries religious or ecclesiastical impediments exist; in others, where that is not the case, the legal conditions of capacity and requisite forms are very serious obstacles. A critical examination of the law of different countries of Europe would only serve to augment the weight of legal objections to the celebration of marriages by consuls of the United States.

"It may be, that a marriage between foreigners, celebrated by a consul of the United States abroad, though utterly null in the country where it is celebrated, might, if the parties emigrate to this country, acquire validity in some of the States of the Union, as a marriage proved by repute and by cohabitation following consent, according to the old rule of the common law. Even then, the certificate of the consul would not constitute the marriage; it would serve at most only as proof of consent, to be connected with proof of cohabitation.

"But the practice of celebrating such marriages would be objectionable even then, because it is in fraud of the local jurisdiction, and contrary to the dictates of international comity, if not to positive law.

"In what precedes, the inquiry has been treated as relating entirely to marriages assumed to be legalized by consuls of the United States residing officially in any of the countries of Christendom.

"For, in regard to States not Christian, although we make treaties with them as occasion may require, and assert in our intercourse with them all such provisions of the law of nations as are of a political nature; yet we do not suffer, as to them, that full reciprocity of municipal obligations and rights which obtains among the nations of Christendom.

"This point is determined very explicitly in our treaty with China, which, in the most unequivocal terms, places all the rights of Americans in China, whether as to person or property, under the sole jurisdiction, civil and criminal, of the authorities of the United States, (see the Treaty, viii. Stat. at Large, p. 592); and Congress has made provision to meet the exigencies of the treaty in this respect. Act of August 11, 1848, ix. Stat. at Large, p. 276.

"Our treaty with Turkey is less explicit on this point; but it expressly ascribes to citizens of the United States exterritoriality in criminal matters (see the Treaty, viii. Stat. at Large, p. 408,) provision as to which is made by the above cited act of Congress: and as the treaty stipulates how controversies in Turkey, between citizens of the United States and subjects of the Porte, shall be adjudicated, that is, by the local authorities in presence of a representative of the United States; and as it stipulates that only a certain class of litigation shall be submitted to the Porte; and as it gives to Americans in Turkey all the rights of the most favored nation, with express reference to "the usages observed towards other Franks,"—it might be assumed that the doctrine of exterritoriality applies to Americans in Turkey, as it certainly does to subjects there of all the Christian States of Europe. Moreuil, Guide des Agents Consulaires, tit. ii.

prince at whose court the minister resides. In the latter case, he is provided with new letters of credence; but where there is

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"Our treaties with the minor Mohammedan governments of Tripoli, Morocco, Muscat, and Bruni, are even less explicit than that of Turkey. Still it may be assumed in regard to them, as a principle of the international law of the world, so far as there is any, that unless there be express agreement to the contrary, no Christian nation admits a full reciprocity of municipal rights as between itself and any State not Christian; and therefore, that in the Mohammedan governments above enumerated, Americans possess the rights of exterritoriality which belong to all other "Franks," that is, the races of independent Christian Europe and America. See Ward's Law of Nations, vol. ii. *passim;* Klüber, Droit des Gens, s. 1d.; Wiseman's Institutes, vol. i. p. 130.

"In our treaty with Siam, we have inconsiderately engaged that our citizens being there "shall respect and *follow* the laws and customs of the country *in all points*." See the Treaty, viii. Stat. at Large, p. 455. That provision of the treaty is, in the international relations of the United States, the solitary exception, it is believed, to the rule that the municipal rights of citizens of the United States are not subject to the local law of any State not Christian.

"True, we deal with such States as *governments*, and apply to them, so far as we can, the doctrines of our international law. The Helena, iv. Robins. Adm. R. 5. But, when we speak of the law of nations, we mean the international law of the nations of Christian Europe and America. Our treaties with nations other than these bring them practically within the pale of our public law, but it is only as to *political* rights: municipal rights remain as they were. Wheaton's Elements, p. 44; Polson's Law of Nations, p. 17; Phillimore's International Law, p. 86.

"The doctrine above enunciated applies to Japan; to the minor independent States of Asia and its islands, whether Mohammedan, Indo-Chinese, Malay, or what others; to the barbaric political communities of Africa; and still more to the petty insular tribes of Oceanica.

"Our treaty with the Hawaiian Islands places them on the footing of a Christian State, with the municipal rights belonging to the international law of Christendom. ix. Stat. at Large, p. 977.

"Now, in regard to the States not Christian, not only the Mohammedan States but all the rest, it seems to me that the true rule is, that contracts of citizens of the United States in general, and especially the contract of marriage, are not subject to the *lex loci*, but must be governed by the law of the domicile; and that, therefore, in such countries, a valid contract of marriage may be solemnized, and the contract authenticated, not only by an ambassador, but by a consul of the United States.

"The English authorities come to substantially the same conclusion, for similar reasons. "Nobody can suppose," says Lord Stowell, "that whilst the Mogul empire existed, an Englishman (in Hindostan) was bound to consult the Koran for the celebration of his marriage. In most of the Asiatic and African countries, indeed, the law is personal, not local, as it was in many parts of Modern Europe in the formative period of its present organization. Hence, in British India,

reason to believe that the mission will be suspended for a short time only, a negotiation already commenced may be continued with the same minister confidentially *sub spe rati.*

Hindus, Parsis, Jews, Mohammedans, Christians, all marry according to the law of their religion. Nay, the ecclesiastical law of England goes further than this, for it recognizes the marriage of Englishmen, celebrated according to the English law, that is, by a clergyman, in British factories abroad, though situated in Christian countries, but countries of the Roman Catholic or Greek religion. Ruding *v.* Smith, ii. Hagg. C. R., p. 371; Kent *v.* Burgess, xi. Simons, 361. Indeed, in the preceding cases, as in others, the English authorities, as we have already seen, lay down the broad rule that where, owing to religious or legal difficulties, the marriage is impossible by the *lex loci*, still a lawful marriage may be contracted, and of course authenticated by the best means of which the circumstances admit, as in many cases of marriages contracted in the East Indies and in other foreign possessions of Great Britain. See Catterall *v.* Catterall, i. Roberts, 580.

"This doctrine is conformable to the canon law, which gives effect to what are called *matrimonia clandestina*, that is, marriages celebrated without observance of the religious and other formalities decreed by the Council of Trent (Cavalario, Derecho Canonico, tom. ii. p. 172; Escriche, s. v. Matr.), when contracted in countries where, if those decrees were enforced, there could be no marriage. Walter, Derecho Ecclesiastico, s. 292–294. Nay, in such countries, in the absence of a priest, there may be valid marriage by consent alone, conformably to the canon law as it stood before the Council of Trent, either by *verba de præsenti* or by *verba de futuro cum copulâ*, as happened *ex necessitate rei*, under the Spanish law, in remote parts of America. Of course, in circumstances like this, a marriage might be legalized by a mere military commandant. Patton *v.* Phil. & New Orleans, i. La. An. R., p. 98.

"Surely this doctrine applies to the present question; for, seeing that by the common law of marriage, as now received in all or nearly all the States of the Union, marriage is a civil contract, to the validity of which clerical intervention is unnecessary, (Bishop on Marriage, s. 163.) it would seem to follow, at least as to all those countries, barbaric or other, in which there is in fact no *lex loci*, or those Mohammedan or Pagan countries in which, though a local law exists, yet Americans are not subject to it, that there the personal statute accompanies them, and the contract of marriage, like any other contract, may be certified and authenticated by a consul of the United States.

"But this doctrine does not apply to the countries of Europe, and their colonies in America or other parts of the world, in all which there is a recognized law of the place, and the rule of *locus regit actum* is in full force. There, in my opinion, a consul of the United States has no power to celebrate marriage between either foreigners or Americans.

"It appears that, in some parts of Europe, in consequence of poverty, or other impediments thrown in the way of marriage, there is great prevalence of concu-

5. When the minister, on account of any violation of the law of nations, or any important incident in the course of his negotiation, assumes on himself the responsibility of declaring his mission terminated.

6. When, on account of the minister's misconduct or the measures of his government, the court at which he resides thinks fit to send him away without waiting for his recall.

7. By a change in the diplomatic rank of the minister.

When, by any of the circumstances above mentioned, the minister is suspended from his functions, and in whatever manner his mission is terminated, he still remains entitled to all the privileges of his public character until his return to his own country.[1]

§ 24. Letter of recall.

A formal letter of recall must be sent to the minister by his government: 1. Where the object of his mission has been accomplished, or has failed. 2. Where he is recalled from motives which do not affect the friendly relations of the two governments.

In these two cases, nearly the same formalities are observed as on the arrival of the minister. He delivers a copy of his letter of recall to the minister of foreign affairs, and asks an audience of the sovereign, for the purpose of taking leave. At this audience the minister delivers the original of his letter of recall to the sovereign, with a complimentary address adapted to the occasion.

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binage; that the desire of lawful cohabitation enters into the inducements of emigration; and that it becomes an object, especially with emigrant females, to obtain, before leaving their country, if not a marriage, yet an assured matrimonial engagement; and that such parties are in the practice of entering into mutual promises of marriage, and procuring the contract to be certified by the consul of the United States. Such a contract would probably give rights of action to the parties in this country; it must have a tendency to promote good morals, and be particularly advantageous to the party most needing protection, that is, the female emigrant; and nothing in our own laws, or in our public policy, occurs to me as forbidding it, unless it be contrary to the law of the land in which the contract is made." Mr. Cushing, Attorney-General, to Mr. Marcy, Secretary of State, November 4, 1854.]

[1] Martens, Manuel Diplomatique, ch. 7, § 59; ch. 2, § 15. Précis, &c., liv. vii. ch. 9, § 239. Vattel, liv. iv. ch. 9, § 126.

If the minister is recalled on account of a misunderstanding between the two governments, the peculiar circumstances of the case must determine whether a formal letter of recall is to be sent to him, or whether he may quit the residence without waiting for it; whether the minister is to demand, and whether the sovereign is to grant him, an audience of leave.

Where the diplomatic rank of the minister is raised or lowered, as where an envoy becomes an ambassador, or an ambassador has fulfilled his functions as such, and is to remain as a minister of the second or third class, he presents his letter of recall, and a letter of credence in his new character.

Where the mission is terminated by the death of the minister, his body is to be decently interred, or it may be sent home for interment; but the external religious ceremonies to be observed on this occasion depend upon the laws and usages of the place. The secretary of legation, or, if there be no secretary, the minister of some allied power, is to place the seals upon his effects, and the local authorities have no right to interfere, unless in case of necessity. All questions respecting the succession *ab intestato* to the minister's movable property, or the validity of his testament, are to be determined by the laws of his own country. His effects may be removed from the country where he resided, without the payment of any *droit d'aubaine* or *detraction.*

Although in strictness the personal privileges of the minister expire with the termination of his mission by death, the custom of nations entitles the widow and family of the deceased minister, together with their domestics, to a continuance, for a limited period, of the same immunities which they enjoyed during his lifetime.

It is the usage of certain courts to give presents to foreign ministers on their recall, and on other special occasions. Some governments prohibit their ministers from receiving such presents. Such was formerly the rule observed by the Venetian Republic, and such is now the law of the United States.[1]

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[1] Martens, Precis, &c., liv. vii. ch. 10, §§ 240–245. Manuel Diplomatique, ch. 7, §§ 60–65.

CHAPTER II.

RIGHTS OF NEGOTIATION AND TREATIES.

§ 1. Faculty of contracting by treaty, how limited or modified.

The power of negotiating and contracting public treaties between nation and nation exists in full vigor in every sovereign State which has not parted with this portion of its sovereignty, or agreed to modify its exercise by compact with other States.

Semi-sovereign or dependent States have, in general, only a limited faculty of contracting in this manner; and even sovereign and independent States may restrain or modify this faculty by treaties of alliance or confederation with others. Thus the several States of the North American Union are expressly prohibited from entering into any treaty with foreign powers, or with each other, without the consent of the Congress; whilst the sovereign members of the Germanic Confederation retain the power of concluding treaties of alliance and commerce, not inconsistent with the fundamental laws of the Confederation.[1]

The constitution or fundamental law of every particular State must determine in whom is vested the power of negotiating and contracting treaties with foreign powers. In absolute, and even in constitutional monarchies, it is usually vested in the reigning sovereign. In republics, the chief magistrate, senate, or executive council is intrusted with the exercise of this sovereign power.

§ 2. Form of treaty.

No particular form of words is essential to the conclusion and validity of a binding compact between nations. The mutual consent of the contracting parties may be given expressly or tacitly; and in the first case, either verbally or in

[1] See Pt. I. ch. 2, §§ 23–24, pp. 59–72.

writing. It may be expressed by an instrument signed by the plenipotentiaries of both parties, or by a declaration, and counter declaration, or in the form of letters or notes exchanged between them. But modern usage requires that verbal agreements should be, as soon as possible, reduced to writing in order to avoid disputes; and all mere verbal communications preceding the final signature of a written convention are considered as merged in the instrument itself. The consent of the parties may be given tacitly, in the case of an agreement made under an imperfect authority, by acting under it as if duly concluded.[1]

§ 3. Cartels, truces, and capitulations.

There are certain compacts between nations which are concluded, not in virtue of any special authority, but in the exercise of a general implied power confided to certain public agents, as incidental to their official stations. Such are the official acts of generals and admirals, suspending or limiting the exercise of hostilities within the sphere of their respective military or naval commands, by means of special licenses to trade, of cartels for the exchange of prisoners, of truces for the suspension of arms, or capitulations for the surrender of a fortress, city, or province. These conventions do not, in general, require the ratification of the supreme power of the State, unless such a ratification be expressly reserved in the act itself.[2]

§ 4. Sponsions.

Such acts or engagements, when made without authority, or exceeding the limits of the authority under which they purport to be made, are called *sponsions*.

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[1] Martens, Précis, liv. 2, ch. 2, §§ 49, 51, 65. Heffter, § 87.

The Roman civilians arranged all international contracts into three classes. 1. Pactiones. 2. Sponsiones. 3. Fœdera. The latter were considered the most solemn; and Gaius, in the recently discovered fragments of his Institutes, speaking of the supposition of a treaty of peace concluded in the simple form of a mere *pactio*, says: "Dicitur uno casu hoc verbo (Spondesne? Spondeo.); peregrinum quoque obligari posse, velut si Imperator noster Principem alicujus peregrini populi de pace ita interrogetur: *quod nimium subtiliter dictum est;* quia si quid adversus pactionem fiat, non ex stipulatu agitur, sed jure belli vindicatur." Comm. iii. § 94.)

[2] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 22, §§ 6–8. Vattel, Droit des Gens, liv. ii. ch. 14, § 207.

These conventions must be confirmed by express or tacit ratification. The former is given in positive terms, and with the usual forms; the latter is implied from the fact of acting under the agreement as if bound by its stipulations. Mere silence is not sufficient to infer a ratification by either party, though good faith requires that the party refusing it should notify its determination to the other party, in order to prevent the latter from carrying its own part of the agreement into effect. If, however, it has been totally or partially executed by either party, acting in good faith upon the supposition that the agent was duly authorized, the party thus acting is entitled to be indemnified or replaced in his former situation.[1]

§ 5. Full power and ratification.

As to other public treaties: in order to enable a public minister or other diplomatic agent to conclude and sign a treaty with the government to which he is accredited, he must be furnished with a *full power*, independent of his general *letter of credence*.

Grotius, and after him Puffendorf, consider treaties and conventions, thus negotiated and signed, as binding upon the sovereign in whose name they are concluded, in the same manner as any other contract made by a duly authorized agent binds his principal, according to the general rules of civil jurisprudence. Grotius makes a distinction between the procuration which is communicated to the other contracting party, and the instructions which are known only to the principal and his agent. According to him, the sovereign is bound by the acts of his ambassador, within the limits of his patent full-power, although the latter may have transcended or violated his secret instructions.[2]

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[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 15, § 16; lib. iii. cap. 22, §§ 1–3. Vattel, Droit des Gens, liv. ii. ch. 14, §§ 209–212. Rutherforth's Inst. b. ii. ch. 9, § 21.

[2] "Et in generali præpositione accidere potest ut nos obliget qui præpositus est, agendo contra voluntatem nostram sibi soli significatam: quia hi distincti sunt actus volendi: unus, quo nos obligamus ratum habituros quicquid ille in tali negotiorum genere fecerit; alter, quo illum nobis obligamus, ut non agat nisi ex præscripto, sibi non aliis cognito. Quod notandum est ad ea quæ legati promittunt pro regibus ex vi instrumenti procuratorii, excedendo arcana mandata. Grotius, de Jur. Bel. ac Pac. lib. ii. cap. xi. § 12. Puffendorf, de Jur. Naturæ et Gent. lib. iii. cap. ix. § 2.

This opinion of the earlier public jurists, founded upon the analogies of the Roman law respecting the contract of mandate or commission, has been contested by more recent writers.

Bynkershoek lays down the true principles applicable to this subject, with that clearness and practical precision which distinguish the writings of that great public jurist. In the second book of his *Quæstiones Juris Publici*, (cap. vii.) he propounds the question, whether the sovereign is bound by the acts of his minister, contrary to his secret instructions. According to him, if the question were to be determined by the ordinary rules of private law, it is certain that the principal is not bound where the agent exceeds his powers. But in the case of an ambassador, we must distinguish between the general full-power which he exhibits to the sovereign to whom he is accredited, and his special instructions, which he may, and generally does retain, as a secret between his own sovereign and himself. He refers to the opinion of Albericus Gentilis, (*de Jure Belli*, lib. iii. cap. xiv.) and that of Grotius above cited, that if the minister has not exceeded the authority given in his patent credentials, the sovereign is bound to ratify, although the minister may have deviated from his secret instructions. Bynkershoek admits that if the credentials are special, and describe the particulars of the authority conferred on the minister, the sovereign is bound to ratify whatever is concluded in pursuance of this authority. But the credentials given to plenipotentiaries are rarely special, still more rarely does the secret authority contradict the public full-power, and most rarely of all does a minister disregard his secret instructions.[1] But what if he should disregard them? Is the sovereign bound to ratify in pursuance of the promise contained in the full-power? According to Bynkershoek, the usage of nations, at the time when he wrote, required a ratification by the sovereign to give validity to treaties concluded by his minister, in every instance, except in the very rare case where the entire instructions were contained in the patent full-power. He controverts the position

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[1] "Sed rarum est quod publica mandata sint specialia, rarius quod arcanum mandatum publico sit contrarium, rarissimum verò, quod legatus arcanum posterius spernat, et ex publico priori rem agat." Bynkershoek, Quæst. Jur. Pub. lib. ii. cap. vii.

of Wicquefort, (*l'Ambassadeur et ses Fonctions*, liv. 2, § 15,) condemning the conduct of those princes who had refused to ratify the acts of their ministers on the ground of their contravening secret instructions. The analogies of the Roman law, and the usages of the Roman people, were not to be considered as an unerring guide in this matter, since time had gradually worked a change in the usage of nations, which constitutes the law of nations; and Wicquefort himself, in another passage, had admitted the necessity of a ratification to give validity to the acts of a minister under his full-power.[1] Bynkershoek does not, however, deny that, if the minister has acted precisely in conformity with his patent full-power, which may be special, or his secret instructions, which are always special, even the sovereign is bound to ratify his acts, and subjects himself to the imputation of bad faith if he refuses. But if the minister exceed his authority, or undertake to treat points not contained in his full-power and instructions, the sovereign is fully justified in delaying, or even refusing his ratification. The peculiar circumstances of each particular case must determine whether the rule or the exception ought to be applied.[2]

Vattel considers the sovereign as bound by the acts of his

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[1] "Sed quod olim obtinuit, nunc non obtinet, ut mores gentium sæpe solent mutari, nam postquam ratihabitionem usus invaluit, inter gentes tantum non omnes receptum est, ne fœdera et pacta, a legatis inita, valerent nisi ea probaverint principes, quorum res agitur. Ipse Wicquefort (eodem Opere, l. 1, sect. 16,) necessitatem ratihabitionum satis agnoscit hisce verbis: Que les pouvoirs, quelques amples et absolus qu'ils soient, aient toujours quelque relation aux ordres secrets qu'on leur donne, qui peuvent être changés et altérés, et qui le sont souvent, selon les conjonctures et les revolutions des affaires." Ibid.

[2] "Non tamen negaverim, si legatus publicum mandatum, quod forte speciale est, vel arcanum, quod semper est speciale, examussim sequutus, fœdera et pacta ineat, justi principis esse ea probare, et nisi probaverit, malæ fidæi reum esse, simulque legatum ludibrio; sin autem mandatum excesserit, vel fœderibus et pactis nova quædam sint inserta, de quibus nihil mandatum erat, optimo jure poterit princeps vel differe ratihabitionem, vel plane negare. Secundum hæc damnaverim vel probaverim negatas ratihabitiones, de quibus prolixè agit Wicquefort, (d. L. ii. sect. 15.) In singulis causis, quas ipse ibi recenset, ego nolim judex sedere, nam plurimum facti habent, quod me latet, et forte ipsum latuit. Non immeritò autem nunc gentibus placuit ratihabitio, cùm mandata publica, ut modo dicebam vix unquam sint specialia, et arcana legatus in scriniis suis servare solent, neque adeo de his quicquam rescire possint, quibuscum actum est." Ibid.

minister, within the limits of his credentials, unless the power of ratifying be expressly reserved, according to the practice already established at the time when he wrote.

"Sovereigns treat with each other through the medium of their attorneys or agents, who are invested with sufficient powers for the purpose, and are commonly called plenipotentiaries. To their office we may apply all the rules of natural law which respect things done by commission. The rights of the agent are determined by the instructions that are given him. He must not deviate from them; but every promise which he makes, within the terms of his commission, and within the extent of his powers, binds his constituent.

"At present, in order to avoid all danger and difficulty, princes reserve to themselves the power of ratifying what has been concluded in their name by their ministers. The full-power is but a procuration *cum libera*. If this procuration were to have its full effect, they could not be too circumspect in giving it. But as princes cannot be compelled to fulfil their engagements, otherwise than by force of arms, it is customary to place no dependence on their treaties until they have agreed to and ratified them. Thus, as every agreement made by the minister remains invalid until sanctioned by the ratification of the prince, there is less danger in giving the minister a full power. But before a sovereign can honorably refuse to ratify that which has been concluded in virtue of a full power, he must have strong and solid reasons, and, in particular, he must show that his minister has deviated from his instructions."[1]

The slightest reflection will show how wide is the difference between the power given by sovereigns to their ministers to negotiate treaties respecting vast and complicated international concerns, and that given by an individual to his agent or attorney to contract with another in his name respecting mere private affairs. The acts of public ministers under such full powers have been considered from very early times as subject to ratification.[2]

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[1] Vattel, Droit des Gens, liv. ii. ch. 12, § 156.

[2] One of the earliest recorded examples of this practice was given in the treaty of peace concluded, in 651, by the Roman Emperor Justinian, with Cosroes I. King of Persia. Both the preliminaries and the definitive treaty, signed by the respective plenipotentiaries, were subsequently ratified by the two monarchs, and

The reason on which this practice is founded is clearly explained by a veteran diplomate whose long experience gives additional weight to his authority. "The forms in which one State negotiates with another," says Sir Robert Adair, "requiring, for the sake of the business itself, that the powers to transact it should be as extensive and general as words can render them, it is usual so to draw them up, even to a promise to ratify; although in practice, the non-ratification of preliminaries is never considered to be a contravention of the law of nations. The reason is plain. A plenipotentiary, to obtain credit with a State on an equality with his master, must be invested with powers to do, and agree to, all that could be done and agreed to by his master himself, even to the alienating the best part of his territories. But the exercise of these vast powers, always under the understood control of non-ratification, is regulated by his instructions."[1]

The exposition of the approved practice of nations, from which alone the law of nations applicable to this matter can be deduced, conclusively shows that a full-power, however general, and even extending to a promise to ratify, does not involve the obligation of ratifying in a case where the plenipotentiary has deviated from his instructions. Yet the contrary doctrine inferred, as we have seen, by the earlier public jurists, from the analogies of private law in respect to the obligation of contracts, concluded by procuration, is countenanced by a modern writer of no inconsiderable merit. Klüber asserts that "public treaties can only be concluded in a valid manner by the ruler of the State, who represents it towards foreign nations, either immediately by himself, or through the agency of plenipotentiaries, and in a manner conformable to the constitutional laws of the State. A treaty concluded by such a plenipotentiary is valid, provided he has not

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the ratifications formally exchanged. Barbeyrac. Histoire des anciens traités Partie ii. p. 295.

It has been very justly observed that this example of the exchange of formal ratifications, at a period of the world like that of Justinian, which invented nothing, but only collected and followed the precedents of the preceding ages, is conclusive to show that this sanction was then deemed necessary by the general usage of nations to give validity to treaties concluded under full powers. Wurm, Die Ratification von Staatsverträgen, Deutsche Vierteljahrs-Schrift Nr. 29.

[1] Adair, Mission to the Court of Vienna, p. 51.

transcended his patent full-power; and a subsequent ratification is only required in the case where it is expressly reserved in the full-power, or stipulated in the treaty itself, as is usually the case at present in all those conventions which are not, such as military arrangements are, of urgent necessity. The ratification by one of the contracting parties does not bind the other party to give his in return. Except in the case of special stipulations, a treaty is deemed to take effect from the time of the signature, and not from that of the ratification. A simple sponsion, an engagement entered into for the State, whether made by the representative of the State or his agent, unless he has full authority for making it, is not binding, except so far as it is ratified by the State. The question whether a treaty, made in the name of the State, by the chief of the government with the enemy, while the former is a prisoner of war, is binding on the State, or whether it is to be regarded even as a sponsion, has given rise to serious disputes." [1]

Martens concurs with Klüber so far as to admit, that what he calls the universal law of nations, "does not require a special ratification to render obligatory the engagement of a minister acting within the limits of his full-power, on the faith of which the other contracting party has entered into negotiation with him, even if the minister has transcended his secret instructions." But he very correctly adds, that "the positive law of nations, considering the necessity of giving to negotiators very extensive full-powers, has required a special ratification so as not to expose the State to the irreparable injury which the inadvertence or bad faith of a subordinate authority might occasion it; so that treaties are only relied on when ratified. But the reason of this usage, which may be traced back to the remotest time, sufficiently shows, that if one of the two parties duly offers his ratification, the other party cannot refuse his in return, except so far as his agent may have transcended the limits of his instructions, and consequently is liable to punishment; and that, at least regularly, it does not depend upon the unlimited discretion of one nation to refuse its ratification by alleging mere reasons of convenience." [2]

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[1] Klüber, Droit des Gens Moderne de l'Europe, § 142.

[2] Martens. Précis, &c., § 48.

Martens remarks, in a note to the third edition of his work, published after Klüber's had appeared, that the latter is of a contrary opinion, as to the obligation of one party to exchange ratifications when proposed by the other; "and as he (Klüber) considers the ratification as necessary only where it is reserved in the full power, or in the treaty itself, (which is at present rarely omitted,) it seems that this author deduces from this reservation the right of arbitrarily refusing the ratification, *which I doubt.*"[1]

This observation of Martens appears to be founded on a misapprehension of the meaning of Klüber, into which we had ourselves inadvertently fallen, in the first edition of this work. Although he has not, perhaps, guarded his meaning with sufficient caution, further examination has convinced us that neither Klüber, nor any other institutional writer, has laid down so lax a principle, as that the ratification of a treaty, concluded in conformity with a full power, may be refused at the mere caprice of one of the contracting parties, and without assigning strong and solid reasons for such refusal.

The expressions used by Vattel, that "before a sovereign can honorably refuse to ratify that which has been concluded in virtue of a full power, he must have strong and solid reasons, and in particular, he must show that his minister has deviated from his instructions," may seem to imply that he considered such deviation as a necessary ingredient in the strong and solid reasons to be alleged for refusing to ratify. But several classes of cases may be enumerated, in which, it is conceived, such refusal might be justified, even where the minister had not transcended or violated his instructions. Among these the following may be mentioned: —

1. Treaties may be avoided, even subsequent to ratification, upon the ground of the impossibility, physical or moral, of fulfilling their stipulations. Physical impossibility is where the party making the stipulation is disabled from fulfilling it for want of the necessary physical means depending on himself. Moral impossibility is where the execution of the engagement would affect injuriously the rights of third parties. It follows, in both

[1] Martens, 3d edit, Note f.

cases, that if the impossibility of fulfilling the treaty arises, or is discovered previous to the exchange of ratifications, it may be refused on this ground.

2. Upon the ground of mutual error in the parties respecting a matter of fact, which, had it been known in its true circumstances, would have prevented the conclusion of the treaty. Here, also, if the error be discovered previous to the ratification, it may be withheld upon this ground.

3. In case of a change of circumstances, on which the validity of the treaty is made to depend, either by an express stipulation, (*clausula rebus sic stantibus*,) or by the nature of the treaty itself. As such a change of circumstances would avoid the treaty, even after ratification, so if it take place previous to the ratification, it will afford a strong and solid reason for withholding that sanction.

Every treaty is binding on the contracting parties from the date of its signature, unless it contain an express stipulation to the contrary. The exchange of ratifications has a retroactive effect, confirming the treaty from its date.[1] (*a*)

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[1] Martens, Precis, &c., § 48. Essai concernant les Armateurs, &c., § 48. Klüber, Droit des Gens Moderne de l'Europe, § 48. Heffter, das Europäische Völkerrecht, § 87.

(*a*) [When territory is ceded, the national character continues for commercial purposes till actual delivery; but between the time of signing the treaty and the actual delivery of the territory, the sovereignty of the ceding power ceases, except for strictly municipal purposes, or for such an exercise of it as is necessary to preserve and enforce the sanctions of its social condition. This rule applies to treaties signed by plenipotentiaries having full powers to make the cession, and which have afterwards been ratified, and not to those entered into and signed conditionally, *sub spe rati*, by a minister not furnished with orders to execute it absolutely. Howard's Rep. vol. ix. pp. 280–293. Davis *v.* The Police Jury of Concordia.

In 1841, the King of the Netherlands refused to ratify a treaty made by his plenipotentiaries, for the annexation of Luxembourg to the Customs' Union, after a protracted negotiation; assigning as a reason the representations made to him by his subjects of the Grand Duchy, of the injurious effects the Convention was likely to have on their local commercial interests. This explanation was not satisfactory to the Prussian cabinet, which considered the treaty as morally binding on the King of Holland, in his capacity of Grand Duke of Luxembourg. Mr. Wheaton's MS. Despatches. The French government refusing, on account of the opposition of the Chambers, to ratify the Quintuple Treaty, of 1841, for the suppression of the slave trade, M. Guizot contended that a ratification was

The recent interference of four of the great European powers in the internal affairs of the Ottoman Empire, affords a remarkable example of a treaty concluded by plenipotentiaries, which was not only held to be completely binding between the contracting parties, but the execution of which was actually commenced before the exchange of ratifications. Such was the case with the Convention of the 15th July, 1840, between Austria, Great Britain, Prussia, Russia, and Turkey. In the secret protocol annexed to the treaty, it was stated that, on account of the distance which separated the respective courts from each other, the interests of humanity, and weighty considerations of European policy, the plenipotentiaries, in virtue of their full powers, had agreed that the preliminary measures should be immediately carried into execution, and without waiting for the exchange of ratifications, consenting formally by the present act, and with the assent of their courts, to the immediate execution of these measures."[1]

This anomalous case may, at first sight, seem to contradict the principles above stated, as to the necessity of a previous ratification, to give complete effect to a treaty concluded by plenipotentiaries. But further reflection will show the obvious distinction which exists between a declaration of the plenipotentiaries, authorized by the instructions of their respective courts, dispensing by mutual consent with the previous ratification; and a demand by one of the contracting parties, that the treaty should be carried into execution, without waiting for the ratification of the other party.[1] (*a*)

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not a mere formality but a serious right; and that no treaty was completely concluded till it had been ratified, and that if between the conclusion and ratification of the treaty grave events occurred, which changed the relations of the two powers and the circumstances under which the treaty had been made, it was a matter of right to refuse the ratification. Moniteur, 1 Février, 1843. Ortolan adds, that this doctrine is founded in reason. Diplomatie de la Mer, t. i. p. 94.

In the above cases, the power which gave the instructions to treat was identical with that which was competent to ratify; and the obligation of the executive is not to be confounded with his position, in those countries where, as in the United States, the internal Constitution requires for a ratification the concurrence of another department of the government.]

[1] Murhard, Nouveau Recueil Général, tome i. p. 163.

(*a*) [It is presumed that there is a constitutional impediment to such an arrangement when the United States are a party, as the Senate must concur in

§ 6. The treaty-making power dependent on the municipal constitution.

The municipal constitution of every particular State determines in whom resides the authority to ratify treaties negotiated and concluded with foreign powers, so as to render them obligatory upon the nation. In absolute monarchies, it is the prerogative of the sovereign himself to confirm the act of his plenipotentiary by his final sanction. In certain limited or constitutional monarchies, the consent of the legislative power of the nation is, in some cases, required for that purpose. In some republics, as in that of the United States of America, the advice and consent of the Senate are essential, to enable the chief executive magistrate to pledge the national faith in this form. In all these cases, it is, conse-

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every treaty. On occasion of the treaty concluded by Mr. Wheaton with Hanover, it was proposed to declare by a protocol, signed at the same time with the exchange of ratifications, that though the treaty had been concluded in English and French, in case of any disagreement as to its interpretation, the French copy should be deemed the original. It was, however, the opinion of Mr. Wheaton, in which the Secretary of State concurred, that no such declaration could be entered into without submitting the treaty anew to the Senate. Mr. Wheaton to Secretary of State, 8th July, 1840. But in exchanging the ratifications of the treaty between the United States and Great Britain, in relation to an inter-oceanic communication, the British plenipotentiary subjoined the following explanatory declaration: —

"In proceeding to the exchange of the ratifications of the convention, signed at Washington on the 19th of April, 1850, between her Britannic Majesty and the United States of America, relative to the establishment of a communication, by ship-canal, between the Atlantic and Pacific Oceans, the undersigned, her Britannic Majesty's plenipotentiary, has received her Majesty's instructions to declare that her Majesty does not understand the engagements of that convention to apply to her Majesty's settlement at Honduras, or to its dependencies. Her Majesty's ratification of the said convention is exchanged under the explicit declaration above mentioned.

"Done at Washington, the 29th day of June, 1850.

"H. L. Bulwer."

It appears from the printed documents that Mr. Clayton filed, on 5th of July, 1854, a memorandum in the Department of State, stating that he had received the above declaration on the day of its date; that he wrote, in reply, on 4th of July, a note acknowledging that he had understood that British Honduras was not embraced in the Treaty of 19th of April, but, at the same time, declining to affirm or deny the British title; and that, after signing the note of 4th of July, which he delivered to Sir Henry Bulwer, they immediately proceeded to exchange the ratifications of the treaty. Cong. Doc. 32d Cong. 2d Sess., Senate Ex. Doc. No. 12.]

quently, an implied condition in negotiating with foreign powers, that the treaties concluded by the executive government shall be subject to ratification in the manner prescribed by the fundamental laws of the State.

"He who contracts with another," says Ulpian, "knows, or ought to know, his condition." Qui cum alio contrahit, vel est, vel *debet* esse non ignarus conditionis ejus, (l. 19, D. de div. R. J. 50, 17.) But, in practice, the full powers given by the government of the United States to their plenipotentiaries always expressly reserve the ratification of the treaties concluded by them, by the President, with the advice and consent of the Senate.

§ 7. Auxiliary legislative measures, how far necessary to the validity of a treaty.

The treaty, when thus ratified, is obligatory upon the contracting States, independently of the auxiliary legislative measures, which may be necessary on the part of either, in order to carry it into complete effect. Where, indeed, such auxiliary legislation becomes necessary, in consequence of some limitation upon the treaty-making power, expressed in the fundamental laws of the State, or necessarily implied from the distribution of its constitutional powers, — such, for example, as a prohibition of alienating the national domain, — then the treaty may be considered as imperfect in its obligation, until the national assent has been given in the forms required by the municipal constitution. A general power to make treaties of peace necessarily implies a power to decide the terms on which they shall be made; and, among these, may properly be included the cession of the public territory and other property, as well as of private property included in the eminent domain annexed to the national sovereignty. If there be no limitation expressed in the fundamental laws of the State, or necessarily implied from the distribution of its constitutional authorities on the treaty-making power in this respect, it necessarily extends to the alienation of public and private property, when deemed necessary or expedient.[1]

Commercial treaties, which have the effect of altering the

[1] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 20, § 7. Vattel, Droit des Gens, liv. i. ch. 20, § 244; ch. 2, §§ 262–265. Kent's Comment. on American Law, vol. i. p. 164, 5th ed.

existing laws of trade and navigation of the contracting parties, may require the sanction of the legislative power in each State for their execution. Thus the commercial treaty of Utrecht, between France and Great Britain, by which the trade between the two countries was to be placed on the footing of reciprocity, was never carried into effect; the British Parliament having rejected the bill which was brought in for the purpose of modifying the existing laws of trade and navigation, so as to adapt them to the stipulations of the treaty.[1] In treaties requiring the appropriation of moneys for their execution, it is the usual practice of the British government to stipulate that the king will recommend to parliament to make the grant necessary for that purpose. Under the Constitution of the United States, by which treaties made and ratified by the President, with the advice and consent of the Senate, are declared to be "the supreme law of the land," it seems to be understood that the Congress is bound to redeem the national faith thus pledged, and to pass the laws necessary to carry the treaty into effect.[2] (*a*)

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[1] Lord Mahon's History of England from the Peace of Utrecht, vol. i. p. 24.

[2] Kent's Comment. vol. i. p. 285, 5th ed.

(*a*) [A treaty is, in its nature, a contract between two nations, not a legislative act, and does not, generally, effect of itself the object to be accomplished, but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States, the Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department, and the legislature must execute the contract before it can become a rule for the court. Peters's Rep. vol. ii. p. 314. Foster et al. *v.* Neilson. Ibid. vol. vi. p. 735. United States *v.* Arredondo.

This subject has been frequently discussed, in connection with the Constitution of the United States, as to the treaty-making power of the President and Senate, and the legislative authority of Congress. It especially came under the consideration of the House of Representatives in 1796, on the bill making appropriations to carry into effect the Treaty of 1794 with Great Britain; when President Washington sent a message to the House denying their right to call for the papers connected with the negotiation, and the act was passed, notwithstanding such refusal, by a majority of two votes. In 1816, after the Commercial Convention with England, the question was, whether it was necessary to pass a bill to make our revenue laws conform to the treaty stipulations, or whether the treaty

§ 8. Freedom of consent, how far necessary to the validity of treaties.

By the general *principles* of private jurisprudence, recognized by most, if not all, civilized countries, a contract obtained by violence is void. Freedom of consent is essential to the validity of every agreement, and

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itself operated, *proprio vigore*. In that case, a declaratory act was passed. U. S. Statutes at Large, vol. iii. p. 354. This point was also examined during the session of 1853–4, in the case of the appropriations required for the convention, then recently entered into by the President and Senate, with Mexico. The conclusion on all these occasions would seem to have been, that as the President and Senate are, by the Constitution, fully authorized to enter into treaties, whenever the aid of Congress is required to carry out its provisions, if the treaty be within the constitutional limits, free from fraud, and not destructive of any of the great rights or interests of the country, then there is a moral obligation to grant the aid required. When a treaty comes before the House of Representatives, they are not to proceed in the discussion and examination of it as an act of ordinary legislation. Such a construction would, in effect, repeal the constitutional provision respecting treaties, and nullify the whole power of the government in its intercourse with foreign nations. Congress. Globe, 1853–4. Appendix, p. 1020. These views were ably vindicated by Mr. Pinkney, in the case of the British Convention of 1815, and his argument has been preserved in Mr. Wheaton's Life of Pinkney, pp. 517–549.

That the omission of Congress to pass an appropriation act would be no answer to a foreign government for the non-fulfilment of treaty stipulations, is to be deduced from the ground taken by the United States with France, when the legislative power of the latter State refused to vote the moneys required by the Convention of 1831, by which indemnities were provided for the spoliation on American commerce. The subject was brought to the notice of Congress by President Jackson, in his Annual Message, in December, 1834; with a recommendation that a law should be passed authorizing reprisals upon French property, in case provision should not be made for the payment of the debt at the next session of the French Chambers. Annual Register, 1834, p. 361. Referring to this controversy, Mr. Wheaton said: — "Neither government has any thing to do with the auxiliary legislative measures necessary, on the part of the other State, to give effect to the treaty. The nation is responsible to the government of the other nation for its non-execution, whether the failure to fulfil it proceeds from the omission of one or other of the departments of its government to perform its duty in respect to it. The omission here is on the part of the legislature; but it might have been on the part of the judicial department. The Court of Cassation might have refused to render some judgment necessary to give effect to the treaty. The king cannot compel the Chambers, neither can he compel the Courts; but the nation is not the less responsible for the breach of faith thus arising out of the discordant action of the internal machinery of its constitution." Letter from Mr. Wheaton to Mr. Butler, then Attorney-General of the United States, Copenhagen, 20th January, 1835.]

contracts obtained under duress are void, because the general welfare of society requires that they should be so. If they were binding, the timid would constantly be forced by threats, or by violence, into a surrender of their just rights. The notoriety of the rule that such engagements are void, makes the attempt to extort them among the rarest of human crimes. On the other hand, the welfare of society requires that the engagements entered into by a nation under such duress as is implied by the defeat of its military forces, the distress of its people, and the occupation of its territories by an enemy, should be held binding; for if they were not, wars could only be terminated by the utter subjugation and ruin of the weaker party. Nor does inadequacy of consideration, or inequality in the conditions of a treaty between nations, such as might be sufficient to set aside a contract as between private individuals on the ground of gross inequality or enormous lesion, form a sufficient reason for refusing to execute the treaty.[1]

§ 9. Transitory conventions perpetual in their nature.

General compacts between nations may be divided into what are called *transitory conventions*, and *treaties* properly so termed. The first are perpetual in their nature, so that, being once carried into effect, they subsist independent of any change in the sovereignty and form of government of the contracting parties; and although their operation may, in some cases, be suspended during war, they revive on the return of peace without any express stipulation. Such are treaties of cession, boundary, or exchange of territory, or those which create a permanent servitude in favor of one nation within the territory of another.[2]

Thus the treaty of peace of 1783, between Great Britain and the United States, by which the independence of the latter was acknowledged, prohibited future confiscations of property; and the treaty of 1794, between the same parties, confirmed the titles

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[1] Senior, Edinburgh Rev. No. CLVI. art. 1. Martens, Précis, liv. ii. ch. 2, §§ 50, 52. Grotius, de Jur. Bel. ac Pac. lib. ii. sect. xiv. §§ 4–12.

[2] Vattel, Droit des Gens, liv. ii. ch. 12, § 192. Martens, Précis, &c., liv. ii. ch. 2, § 58.

of British subjects holding lands in the United States, and of American citizens holding lands in Great Britain, which might otherwise be forfeited for alienage. Under these stipulations, the Supreme Court of the United States determined, that the title both of British natural subjects and of corporations to lands in America was protected by the treaty of peace, and confirmed by the treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceeding, for alienage. Even supposing the treaties were abrogated by the war which broke out between the two countries in 1812, it would not follow that the rights of property already vested under those treaties could be devested by supervening hostilities. The extinction of the treaties would no more extinguish the title to real property acquired or secured under their stipulations than the repeal of a municipal law affects rights of property vested under its provisions. But independent of this incontestable principle, on which the security of all property rests, the court was not inclined to admit the doctrine, that treaties become, by war between the two contracting parties, *ipso facto* extinguished, if not revived by an express or implied renewal on the return of peace. Whatever might be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms in relation to the subject, it was satisfied that the doctrine contended for was not universally true. There might be treaties of such a nature as to their object and import, as that war would necessarily put an end to them; but where treaties contemplated a permanent arrangement of territory, and other national rights, or in their terms were meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by war. If such were the law, even the treaty of 1783, so far as it fixed the limits of the United States, and acknowledged their independence, would be gone, and they would have had again to struggle for both, upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning. The court, therefore, concluded that treaties stipulating for permanent rights and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as of peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties,

or new and repugnant stipulations are made, revive upon the return of peace.[1]

Controversy between the American and British governments respecting the rights of fishery on the coasts of the British dominions in North America.

By the 3d article of the treaty of peace of 1783, between the United States and Great Britain, it was "agreed that the people of the United States shall continue to enjoy unmolested the right to take fish of every kind on the Grand Bank, and on all the other Banks of Newfoundland; also in the Gulf of St. Lawrence, and at all other places in the sea, where the inhabitants of both countries used, at any time heretofore, to fish; and also that the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishermen shall use, (but not to dry or cure the same on that island,) and also on the coasts, bays, and creeks of all other of his Britannic Majesty's dominions in America; and that the American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of Nova Scotia, Magdalen Islands, and Labrador, so long as the same shall remain unsettled; but so soon as the same, or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground."

During the negotiation at Ghent, in 1814, the British plenipotentiaries gave notice that their government "did not intend to grant to the United States, gratuitously, the privileges formerly granted by treaty to them of fishing within the limits of the British sovereignty, and of using the shores of the British territories for purposes connected with the British fisheries." In answer to this declaration the American plenipotentiaries stated that they were "not authorized to bring into discussion any of the rights or liberties which the United States have heretofore enjoyed in relation thereto; from their nature, and from the peculiar character of the treaty of 1783, by which they were recognized, no further

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[1] Wheaton's Rep. vol. viii. p. 464. The Society for the Propagation of the Gospel in Foreign Parts *v.* The Town of New Haven. The same principle was asserted by the English Court of Chancery, as to American citizens holding lands in Great Britain under the treaty of 1794. In Sutton *v.* Sutton, Russell & Milne, Rep. vol. i. p. 663.

stipulation has been deemed necessary by the government of the United States to entitle them to the full enjoyment of them all."

The treaty of peace concluded at Ghent, in 1814, therefore, contained no stipulation on the subject; and the British government subsequently expressed its intention to exclude the American fishing vessels from the liberty of fishing within one marine league of the shores of the British territories in North America, and from that of drying and curing their fish on the unsettled parts of those territories, and, with the consent of the inhabitants, within those parts which had become settled since the peace of 1783.

In discussing this question, the American minister in London, Mr. J. Q. Adams, stated, that from the time the settlement in North America, constituting the United States, was made, until their separation from Great Britain and their establishment as distinct sovereignties, these liberties of fishing, and of drying and curing fish, had been enjoyed by them, in common with the other subjects of the British empire. In point of principle, they were preëminently entitled to the enjoyment; and, in point of fact, they had enjoyed more of them than any other portion of the empire; their settlement of the neighboring country having naturally led to the discovery and improvement of these fisheries; and their proximity to the places where they were prosecuted, having led them to the discovery of the most advantageous fishing grounds, and given them facilities in the pursuit of their occupation in those regions, which the remoter parts of the empire could not possess. It might be added, that they had contributed their full share, and more than their share, in securing the conquest from France of the provinces on the coasts of which these fisheries were situated.

It was doubtless upon considerations such as these that an express stipulation was inserted in the treaty of 1783, recognizing the rights and liberties which had always been enjoyed by the people of the United States in these fisheries, and declaring that they should continue to enjoy the right of fishing on the Grand Bank, and other places of common jurisdiction, and have the liberty of fishing, and drying and curing their fish, within the exclusive British jurisdiction on the North American coasts, to which they had been accustomed whilst they formed a part of the British nation. This stipulation was a part of that treaty by

which his Majesty acknowledged the United States as free, sovereign, and independent States, and that he treated with them as such.

It could not be necessary to prove that this treaty was not, in its general provisions, one of those which, by the common understanding and usage of civilized nations, is considered as annulled by a subsequent war between the same parties. To suppose that it is, would imply the inconsistency and absurdity of a sovereign and independent State, liable to forfeit its right of sovereignty by the act of exercising it on a declaration of war. But the very words of the treaty attested that the sovereignty and independence of the United States were not considered as grants from his Majesty. They were taken and expressed as existing before the treaty was made, and as then only first formally recognized by Great Britain.

Precisely of the same nature were the rights and liberties in the fisheries. They were, in no respect, grants from the King of Great Britain to the United States; but the acknowledgment of them as rights and liberties enjoyed before the separation of the two countries, and which it was mutually agreed should continue to be enjoyed under the new relations which were to subsist between them, constituted the essence of the article concerning the fisheries. The very peculiarity of the stipulation was an evidence that it was not, on either side, understood or intended as a grant from one sovereign State to another. Had it been so understood, neither could the United States have claimed, nor would Great Britain have granted, gratuitously, any such concession. There was nothing, either in the state of things, or in the disposition of the parties, which could have led to such a stipulation on the part of Great Britain, as on the ground of a grant, without an equivalent.

If the stipulation by the treaty of 1783, was one of the conditions by which his Majesty acknowledged the sovereignty and independence of the United States; if it was the mere recognition of rights and liberties previously existing and enjoyed, it was neither a privilege gratuitously granted, nor liable to be forfeited by the mere existence of a subsequent war. If it was not forfeited by the war, neither could it be impaired by the declaration of Great Britain at Ghent, that she did not intend to renew the grant. Where there had been no gratuitous concession, there

could be none to renew; the rights and liberties of the United States could not be cancelled by the declaration of the British intentions. Nothing could abrogate them but a renunciation by the United States themselves.[1]

In the answer of the British government to this communication, it was stated that Great Britain had always considered the liberty formerly enjoyed by the United States, of fishing within British limits and using British territory, as derived from the 3d article of the Treaty of 1783, and from that alone; and that the claim of an independent State to occupy and use, at its discretion, any portion of the territory of another, without compensation or corresponding indulgence, could not rest on any other foundation than conventional stipulation. It was unnecessary to inquire into the motives which might have originally influenced Great Britain in conceding such liberties to the United States, or whether other articles of the treaty did or did not, in fact, afford an equivalent for them, because all the stipulations profess to be founded on reciprocal advantage and mutual convenience. If the United States derived from that treaty privileges, from which other independent nations not admitted by treaty were excluded, the duration of the privileges must depend on the duration of the instrument by which they were granted; and if the war abrogated the treaty, it determined the privileges. It had been urged, indeed, on the part of the United States, that the Treaty of 1783 was of a peculiar character, and that, because it contained a recognition of American independence, it could not be abrogated by a subsequent war between the parties. To a position of this novel nature Great Britain could not accede. She knew of no exception to the rule, that all treaties are put an end to by a subsequent war between the same parties; she could not, therefore, consent to give her diplomatic relations with one State a different degree of permanency from that on which her connection with all other States depended. Nor could she consider any one State at liberty to assign to a treaty made with her such a peculiarity of character as should make it, as to duration, an exception to all other treaties, in order to found, on a

[1] Mr. J. Q. Adams to Lord Bathurst, Sept. 25, 1815. American State Papers, fol. edit. 1834, vol. iv. p. 352.

peculiarity thus assumed, an irrevocable title to indulgences which had all the features of temporary concessions.

It was by no means unusual for treaties containing recognitions and acknowledgments of title, in the nature of perpetual obligation, to contain, likewise, grants of privileges liable to revocation. The Treaty of 1783, like many others, contained provisions of different character; some in their own nature irrevocable, and others merely temporary. If it were thence inferred that, because some advantages specified in that treaty would not be put an end to by the war, therefore all the other advantages were intended to be equally permanent, it must first be shown that the advantages themselves are of the same, or at least of a similar character; for the character of one advantage, recognized or conceded by treaty, can have no connection with the character of another, though conceded by the same instrument, unless it arises out of a strict and necessary connection between the advantages themselves. But what necessary connection could there be between a right to independence and a liberty to fish within British jurisdiction, or to use British territory? Liberties within British limits were as capable of being exercised by a dependent as by an independent State; and could not, therefore, be the necessary consequence of independence.

The independence of a State could not be correctly said to be granted by a treaty, but to be acknowledged by one. In the Treaty of 1783, the independence of the United States was certainly acknowledged, not merely by the consent to make the treaty, but by the previous consent to enter into the provisional articles, executed in 1782. Their independence might have been acknowledged, without either the treaty or the provisional articles; but by whatever mode acknowledged, the acknowledgment was, in its own nature, irrevocable. A power of revoking, or even of modifying it, would be destructive of the thing itself; and, therefore, all such power was necessarily renounced when the acknowledgment was made. The war could not put an end to it, for the reason justly assigned by the American minister; because a nation could not forfeit its sovereignty by the act of exercising it; and for the further reason that Great Britain, when she declared war against the United States, gave them, by that very act, a new recognition of their independence.

The *rights* acknowledged by the Treaty of 1783 were not only

distinguishable from the *liberties* conceded by the same treaty, in the foundation on which they stand, but they were carefully distinguished in the wording of the treaty. In the 1st article, Great Britain acknowledged an independence already expressly recognized by the other powers of Europe, and by herself in her consent to enter into the provisional articles of 1782. In the 3d article, Great Britain acknowledged the *right* of the United States to take fish on the Banks of Newfoundland and other places, from which Great Britain had no right to exclude any independent nation. But they were to have the *liberty* to cure and dry them in certain unsettled places within the British territory. If the liberties thus granted were to be as perpetual and indefeasible as the rights previously recognized, it was difficult to conceive that the American plenipotentiaries would have admitted a variation of language so adapted to produce a different impression; and, above all, that they should have admitted so strange a restriction of a perpetual and indefeasible right as that with which the article concludes, which left a right so practical and so beneficial as this was admitted to be, dependent on the will of British subjects, proprietors, or possessors of the soil, to prohibit its exercise altogether.

It was, therefore, surely obvious that the word *right* was, throughout the treaty, used as applicable to what the United States were to enjoy in virtue of a recognized independence; and the word *liberty* to what they were to enjoy as concessions strictly dependent on the treaty itself.[1]

The American minister, in his reply to this argument, disavowed every pretence of claiming for the diplomatic relations between the United States and Great Britain a degree of permanency different from that of the same relations between either of the parties and all other powers. He disclaimed all pretence of assigning to any treaty between the two nations, any peculiarity not founded in the nature of the treaty itself. But he submitted to the candor of the British government whether the Treaty of 1783 was not, from the very nature of its subject-matter, and from the relations previously existing between the parties to it, peculiar? Whether it was a treaty which could

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[1] Earl Bathurst to Mr. J. Q. Adams, Oct. 30, 1815. American State Papers, fol. edit. 1834, vol. iv. p. 354.

have been made between Great Britain and any other nation? And if not, whether the whole scope and object of its stipulations were not expressly intended to establish a new and permanent state of diplomatic relations between the two countries, which would not and could not be annulled by the mere fact of a subsequent war? And he made this appeal with the more confidence, because the British note admitted that treaties often contained recognitions in the nature of perpetual obligation; and because it implicitly admitted that the whole Treaty of 1783 is of this character, with the exception of the article concerning the navigation of the Mississippi, and a small part of the article concerning the fisheries.

The position, that "Great Britain knows of no exception to the rule, that all treaties are put an end to by a subsequent war," appeared to the American minister not only novel, but unwarranted by any of the received authorities upon the law of nations; unsanctioned by the practice and usages of sovereign States; suited, in its tendency, to multiply the incitements to war, and to weaken the ties of peace between independent nations; and not easily reconciled with the admission that treaties not unusually contain, together with articles of a temporary character, liable to revocation, "recognitions and acknowledgments in the nature of perpetual obligation."

A recognition or acknowledgment of title, stipulated by convention, was as much a part of the treaty as any other article; and if all treaties are abrogated by war, the recognitions and acknowledgments contained in them must necessarily be null and void, as much as any other part of the treaty.

If there were no exception to the rule, that war puts an end to all treaties between the parties to it, what could be the purpose or meaning of those articles which, in almost all treaties of commerce, were provided expressly for the contingency of war, and which during the peace are without operation? For example, the 10th article of the Treaty of 1794, between the United States and Great Britain, stipulated that "Neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor moneys, which they may have in the public funds, or in the public or private banks, shall ever, *in any event of war*, or national differences, be sequestered or confiscated." If war put an end to all treaties, what could the parties to this engagement intend by making it formally an article of

the treaty? According to the principle laid down, excluding all exception, by the British note, the moment a war broke out between the two countries this stipulation became a dead letter, and either State might have sequestered or confiscated those specified properties, without any violation of compact between the two nations.

The American minister believed that there were many exceptions to the rule by which the treaties between nations are mutually considered as terminated by the intervention of a war; that these exceptions extend to all engagements contracted with the understanding that they are to operate equally in war and peace, or exclusively during war; to all engagements by which the parties superadd the sanction of a formal compact to principles dictated by the eternal laws of morality and humanity; and, finally, to all engagements, which, according to the expression of the British note, are *in the nature of perpetual obligation.* To the first and second of these classes might be referred the 10th article of the Treaty of 1794, and all treaties or articles of treaties stipulating the abolition of the slave-trade. The treaty of peace of 1783 belongs to the third class.

The reasoning of the British note seemed to confine this perpetuity of obligation to recognitions and acknowledgments of title, and to consider its perpetual nature as resulting from the subject-matter of the contract, and not from the engagement of the contractor. While Great Britain left the United States unmolested in the enjoyment of all the advantages, rights, and liberties stipulated in their behalf in the Treaty of 1783, it was immaterial whether she founded her conduct upon the mere fact that the United States are in possession of such rights, or whether she was governed by good faith and respect for her own engagements. But if she contested any of these rights, it was to her engagements only that the United States could appeal, as the rule for settling the question of right. If this appeal were rejected, it ceased to be a discussion of right; and this observation applied as strongly to the recognition of independence and the boundary line, in the Treaty of 1783, as to the fisheries. It was truly observed in the British note, that in that treaty the independence of the United States was not granted, but acknowledged; and it was added, that it might have been acknowledged without any treaty, and that the acknowledgment, in whatever

mode, would have been irrevocable. But the independence of the United States was precisely the question upon which a previous war between them and Great Britain had been waged. Other nations might acknowledge their independence without a treaty, because they had no right or claim of right to contest it; but this acknowledgment, to be binding upon Great Britain, could have been made only by treaty, because it included the dissolution of one social compact between the parties, as well as the formation of another. Peace could exist between the two nations only by the mutual pledge of faith to the new social relations established between them; and hence it was, that the stipulations to that treaty were in the nature of perpetual obligation, and not liable to be forfeited by a subsequent war, or by any declaration of the will of either party, without the assent of the other.[1]

The above analysis of the correspondence which took place relating to this subject, has been inserted as illustrative of the general question, how far treaties are abrogated by war between the parties to them; but the particular controversy itself was finally settled between the two countries on the basis of compromise, by the convention of 1818, in which the liberty claimed by the United States in respect to the fishery within the British jurisdiction and territory, was confined to certain geographical limits.[2]

§ 10. Treaties, the operation of which cease in certain cases.

Treaties, properly so called, or *fœdera*, are those of friendship and alliance, commerce, and navigation, which, even if perpetual in terms, expire of course: —

1. In case either of the contracting parties loses its existence as an independent State.

2. Where the internal constitution of government of either State is so changed, as to render the treaty inapplicable under circumstances different from those with a view to which it was concluded.

Here the distinction laid down by institutional writers between

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[1] Mr. J. Q. Adams to Lord Castlereagh, Jan. 22, 1816. American State Papers, fol. edit. 1834, vol. iv. p. 356.

[2] Vide supra, pt. 2, ch. iv. § 8, p. 236.

real and *personal* treaties becomes important. The first bind the contracting parties independently of any change in the sovereignty, or in the rulers of the State. The latter include only treaties of mere personal alliance, such as are expressly made with a view to the person of the actual ruler or reigning sovereign, and though they bind the State during his existence, expire with his natural life or his public connection with the State.[1]

3. In case of war between the contracting parties; unless such stipulations as are made expressly with a view to a rupture, such as the period of time allowed to the respective subjects to retire with their effects, or other limitations of the general rights of war. Such is the stipulation contained in the 10th article of the Treaty of 1794, between Great Britain and the United States,—providing that private debts and shares or moneys in the public funds, or in public or private banks belonging to private individuals, should never, in the event of war, be sequestered or confiscated. There can be no doubt that the obligation of this article would not be impaired by a supervening war, being the very contingency meant to be provided for, and that it must remain in full force until mutually agreed to be rescinded.[2]

4. Treaties expire by their own limitation, unless revived by express agreement, or when their stipulations are fulfilled by the respective parties, or when a total change of circumstances renders them no longer obligatory.

§ 11. Treaties revived and confirmed on the renewal of peace.

Most international compacts, and especially treaties of peace, are of a mixed character, and contain articles of both kinds, which renders it frequently difficult to distinguish between those stipulations which are perpetual in their nature, and such as are extinguished by war between the contracting parties, or by such changes of circumstances as affect the being of either party, and thus render the compact inapplicable to the new condition of things. It is for this reason, and from abundance of caution, that stipulations are

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[1] Vide ante, pt. i. ch. 2, § 11, p. 36.

[2] Vattel, liv. iii. ch. 10, § 175. Kent's Comment. on American Law, vol. i. p. 175. 5th ed.

frequently inserted in treaties of peace, expressly reviving and confirming the treaties formerly subsisting between the contracting parties, and containing stipulations of a permanent character, or in some other mode excluding the conclusion that the obligation of such antecedent treaties is meant to be waived by either party. The reiterated confirmations of the treaties of Westphalia and Utrecht, in almost every subsequent treaty of peace or commerce between the same parties, constituted a sort of written code of conventional law, by which the distribution of power and territory among the principal European States was permanently settled, until violently disturbed by the partition of Poland and the wars of the French revolution. The arrangements of territory and political relations substituted by the treaties of Vienna for the ancient conventional law of Europe, and doubtless intended to be of a similar permanent character, have already undergone, in consequence of the French, Polish, and Belgic revolutions of 1830, very important modifications, of which we have given an account in another work.[1]

§ 12. Treaties of guaranty.

The convention of guaranty is one of the most usual international contracts. It is an engagement by which one State promises to aid another where it is interrupted, or threatened to be disturbed, in the peaceable enjoyment of its rights by a third power. It may be applied to every species of right and obligation that can exist between nations; to the possession and boundaries of territories, the sovereignty of the State, its constitution of government, the right of succession, &c.; but it is most commonly applied to treaties of peace. The guaranty may also be contained in a distinct and separate convention, or included among the stipulations annexed to the principal treaty intended to be guaranteed. It then becomes an accessary obligation.[2]

The guaranty may be stipulated by a third power not a party to the principal treaty, by one of the contracting parties in favor

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[1] Wheaton, Hist. Law of Nations, pp. 435–445, 538–551.

[2] Vattel, Droit des Gens, liv. ii. ch. 16, §§ 235–239. Klüber, Droit des Gens Moderne de l'Europe, pt. ii. tit. 2, sect. 1, ch. 2, §§ 157, 158. Martens, Précis, &c., § 63.

of another, or mutually between all the parties. Thus, by the treaty of peace concluded at Aix-la-Chapelle in 1748, the eight high contracting parties mutually guaranteed to each other all the stipulations of the treaty.

The guaranteeing party is bound to nothing more than to render the assistance stipulated. If it prove insufficient, he is not obliged to indemnify the power to whom his aid has been promised. Nor is he bound to interfere to the prejudice of the just rights of a third party, or in violation of a previous treaty rendering the guaranty inapplicable in a particular case. Guaranties apply only to rights and possessions existing at the time they are stipulated. It was upon these grounds that Louis XV. declared, in 1741, in favor of the Elector of Bavaria against Maria Theresa, the heiress of the Emperor Charles VI., although the court of France had previously guaranteed the pragmatic sanction of that Emperor, regulating the succession to his hereditary States. And it was upon similar grounds, that France refused to fulfil the treaty of Alliance of 1756 with Austria, in respect to the pretensions of the latter power upon Bavaria, in 1778, which threatened to produce a war with Russia. Whatever doubts may be suggested as to the application of these principles to the above cases, there can be none respecting the principles themselves, which are recognized by all the text writers.[1]

These writers make a distinction between a *Surety* and a *Guarantee*. Thus Vattel lays it down, that where the matter relates to things which another may do or give as well as he who makes the original promise, as, for instance, the payment of a sum of money, it is safer to demand a *surety* (caution) than a *guarantee* (garant). For the surety is bound to make good the promise in default of the principal; whereas the guarantee is only obliged to use his best endeavors to obtain a performance of the promise from him who has made it.[2]

§ 13. Treaties of alliance.

Treaties of alliance may be either defensive or offensive. In the first case, the engagements of the ally extend only to a war really and truly defensive; to a war of

[1] Vattel, liv. ii. ch. 16, § 238. Flassan, Histoire de la Diplomatie Française, tom. vii. p. 195.

[2] Vattel, § 239.

aggression first commenced, in point of fact, against the other contracting party. In the second, the ally engages generally to coöperate in hostilities against a specified power, or against any power with whom the other party may be engaged in war.

An alliance may also be both offensive and defensive.

§ 14. Distinction between general alliance and treaties of limited succour and subsidy.

General alliances are to be distinguished from treaties of limited succor and subsidy. Where one State stipulates to furnish to another a limited succor of troops, ships of war, money, or provisions, without any promise looking to an eventual engagement in general hostilities, such a treaty does not necessarily render the party furnishing this limited succor, the enemy of the opposite belligerent. It only becomes such, so far as respects the auxiliary forces thus supplied; in all other respects it remains neutral. Such for example, have long been the accustomed relations of the confederated Cantons of Switzerland with the other European powers.[1]

§ 15. *Casus fœderis* of a defensive alliance.

Grotius, and the other text writers, hold that the *casus fœderis* of a defensive alliance does not apply to the case of a war manifestly unjust, that is, to a war of aggression on the part of the power claiming the benefit of the alliance. And it is even said to be a tacit condition annexed to every treaty made in time of peace, stipulating to afford succors in time of war, that the stipulation is applicable only to a just war. To promise assistance in an unjust war would be an obligation to commit injustice, and no such contract is valid. But, it is added, this tacit restriction in the terms of a general alliance can be applied only to a manifest case of unjust aggression on the part of the other contracting party, and cannot be used as a pretext to elude the performance of a positive and unequivocal engagement, without justly exposing the ally to the imputation of bad faith. In doubtful cases, the presumption ought rather to be in favor of our confederate, and of the justice of his quarrel.[2]

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[1] Vattel, Droit des Gens, liv. iii. ch. 6, §§ 79–82.

[2] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 15, § 13; cap. 25, § 4. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9. Vattel, Droit des Gens, liv. ii. ch. 12, § 168; liv. iii. ch. 6, §§ 86–96.

The application of these general principles must depend upon the nature and terms of the particular guaranties contained in the treaty in question. This will best be illustrated by specific examples.

Alliance between Great Britain and Holland.

Thus, the States-General of Holland were engaged, previously to the war of 1756, between France and Great Britain, in three different guaranties and defensive treaties with the latter power. The first was the original defensive alliance, forming the basis of all the subsequent compacts between the two countries, concluded at Westminster in 1678. In the preamble to this treaty, the preservation of each other's dominions was stated as the cause of making it ; and it stipulated a mutual guaranty of all they already enjoyed, or might thereafter acquire by treaties of peace, "in Europe only." They further guaranteed all treaties which were at that time made, or might thereafter conjointly be made, with any other power. They stipulated also to defend and preserve each other in the possession of all towns and fortresses which did at that time belong, or should in future belong, to either of them; and, that for this purpose when either nation was attacked or molested, the other should immediately succor it with a certain number of troops and ships, and should be obliged to break with the aggressor in two months after the party that was already at war should require it; and that they should then act conjointly, with all their forces, to bring the common enemy to a reasonable accommodation.

The second defensive alliance then subsisting between Great Britain and Holland was that stipulated by the treaties of barrier and succession, of 1709 and 1713, by which the Dutch barrier on the side of Flanders was guaranteed on the one part, and the Protestant succession to the British crown, on the other; and it was mutually stipulated, that, in case either party should be attacked, the other should furnish, at the requisition of the injured party, certain specified succors; and if the danger should be such as to require a greater force, the other ally should be obliged to augment his succors, and ultimately to act with all his power in open war against the aggressor.

The third and last defensive alliance between the same powers, was the treaty concluded at the Hague in 1717, to which France was also a party. The object of this treaty was declared to be

the preservation of each other reciprocally, and the possession of their dominions, as established by the treaty of Utrecht. The contracting parties stipulated to defend all and each of the articles of the said treaty, as far as they relate to the contracting parties respectively, or each of them in particular; and they guarantee all the kingdoms, provinces, states, rights, and advantages, which each of the parties at the signing of that treaty possessed, confining this guarantee to Europe only. The succors stipulated by this treaty were similar to those above mentioned; first, interposition of good offices, then a certain number of forces, and lastly, declaration of war. This treaty was renewed by the quadruple alliance of 1718, and by the treaty of Aix-la-Chapelle, 1748.

It was alleged on the part of the British court, that the States-General had refused to comply with the terms of these treaties, although Minorca, a possession *in Europe* which had been secured to Great Britain by the treaty of Utrecht, was attacked by France.

Two answers were given by the Dutch government to the demand of the stipulated succors: —

1. That Great Britain was the aggressor in the war; and that, unless she had been first attacked by France, the *casus fœderis* did not arise.

2. That admitting that France was the aggressor in Europe, yet it was only in consequence of the hostilities previously commenced in America, which were expressly excepted from the terms of the guarantees.

To the first of these objections it was irresistibly replied by the elder Lord Liverpool, that although the treaties which contained these guarantees were called defensive treaties only, yet the words of them, and particularly that of 1678, which was the basis of all the rest, by no means expressed the point clearly in the sense of the objection, since they guaranteed "all the rights and possessions" of both parties, against "all kings, princes, republics, and states;" so that if either should "be attacked or molested by hostile act, or open war, or in any other manner disturbed in the possession of his states, territories, rights, immunities, and freedom of commerce," it was then declared what should be done in defence of these objects of the guarantee, by the ally who was not at war, but it was nowhere

mentioned as necessary that the attack of these should be the first injury or attack. "Nor," continues Lord Liverpool, "doth this loose manner of expression appear to have been an omission or inaccuracy. They who framed these guarantees certainly chose to leave this question, without any further explanation, to that good faith which must ultimately decide upon all contracts between sovereign States. It is not presumed that they hereby meant, that either party should be obliged to support every act of violence or injustice which his ally might be prompted to commit through views of interest or ambition; but, on the other hand, they were cautious of affording too frequent opportunities to pretend that the case of the guarantees did not exist, and of eluding thereby the principal intention of the alliance; both these inconveniences were equally to be avoided; and they wisely thought fit to guard against the latter, no less than the former. They knew that in every war between civilized nations, each party endeavors to throw upon the other the odium and guilt of the first act of provocation and aggression; and that the worst of causes was never without its excuse. They foresaw that this alone would unavoidably give sufficient occasion to endless cavils and disputes, whenever the infidelity of an ally inclined him to avail himself of them. To have confined, therefore, the case of the guarantee by a more minute description of it, and under closer restrictions of form, would have subjected to still greater uncertainty a point which, from the nature of the thing itself, was already too liable to doubt: — they were sensible that the cases would be infinitely various; that the motives to self-defence, though just, might not always be apparent; that an artful enemy might disguise the most alarming preparations; and that an injured nation might be necessitated to commit even a preventive hostility, before the danger which caused it could be publicly known. Upon such considerations, these negotiators wisely thought proper to give the greatest latitude to this question, and to leave it open to a fair and liberal construction, such as might be expected from friends, whose interests these treaties were supposed to have forever united." [1]

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[1] Discourse on the Conduct of the Government of Great Britain in respect to Neutral Nations. By Charles, Earl of Liverpool. 1st ed. 1757.

His lordship's answer to the next objection, that the hostilities commenced by France in Europe were only in consequence of hostilities previously commenced in America, seems equally satisfactory, and will serve to illustrate the good faith by which these contracts ought to be interpreted. "If the reasoning on which this objection is founded was admitted, it would alone be sufficient to destroy the effects of every guarantee, and to extinguish that confidence which nations mutually place in each other, on the faith of defensive alliances; it points out to the enemy a certain method of avoiding the inconvenience of such an alliance; it shows him where he ought to begin his attack. Let only the first effort be made upon some place not included in the guarantee, and, after that, he may pursue his views against its very object, without any apprehension of the consequence. Let France first attack some little spot belonging to Holland, in America, and her barrier would be no longer guaranteed. To argue in this manner is to trifle with the most solemn engagements. The proper object of guarantees is the preservation of some particular country to some particular power. The treaties above mentioned promise the defence of the dominions of each party in Europe, simply and absolutely, whenever they are *attacked* or *molested*. If, in the present war, the first attack was made out of Europe, it is manifest that long ago an attack hath been made in Europe; and that is, beyond a doubt, the case of these guarantees.

"Let us try, however, if we cannot discover what hath once been the opinion of Holland upon a point of this nature. It hath already been observed that the defensive alliance between England and Holland, of 1678, is but a copy of the first twelve articles of the French Treaty of 1662. Soon after Holland had concluded this last alliance with France, she became engaged in a war with England. The attack then began, as in the present case, out of Europe, on the coast of Guinea; and the cause of the war was also the same, — a disputed right to certain possessions out of the bounds of Europe, some in Africa, and others in the East Indies. Hostilities having continued for some time in those parts, they afterwards commenced also in Europe. Immediately upon this, Holland declared that the case of that guarantee did exist, and demanded the succors which were stipulated. I need not produce the memorials of their ministers to

prove this; history sufficiently informs us that France acknowledged the claim, granted the succors, and entered even into open war in the defence of her ally. Here, then, we have the sentiments of Holland on the same article, in a case minutely parallel. The conduct of France also pleads in favor of the same opinion, though her concession, in this respect, checked at that time her youthful monarch in the first essay of his ambition, delayed for some months his entrance into the Spanish provinces, and brought on him the enmity of England."[1]

Alliance between Great Britain and Portugal.

The nature and extent of the obligations contracted by treaties of defensive alliance and guarantee, will be further illustrated by the case of the treaties subsisting between Great Britain and Portugal, which has been before alluded to for another purpose.[2] The treaty of alliance, originally concluded between these powers in 1642, immediately after the revolt of the Portuguese nation against Spain, and the establishment of the House of Braganza on the throne, was renewed, in 1654, by the Protector, Cromwell, and again confirmed by the Treaty of 1661, between Charles II. and Alfonzo VI., for the marriage of the former prince with Catharine of Braganza. This last-mentioned treaty fixes the aid to be given, and declares that Great Britain will succor Portugal "on all occasions, when that country is attacked." By a secret article, Charles II., in consideration of the cession of Tangier and Bombay, binds himself "to defend the colonies and conquests of Portugal against all enemies, present or future." In 1703, another treaty of defensive and perpetual alliance was concluded at Lisbon, between Great Britain and the States-General on the one side, and the King of Portugal on the other; the guarantees contained in which were again confirmed by the treaties of peace at Utrecht, between Portugal and France, in 1713, and between Portugal and Spain, in 1715. On the emigration of the Portuguese royal family to Brazil, in 1807, a convention was concluded between Great Britain and Portugal, by which the latter kingdom is guaranteed to the lawful heir of the House of Braganza, and the British government promises never to recognize any other ruler. By the more recent treaty between the two powers, concluded at Rio

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[1] Liverpool's Discourse, p. 86.

[2] Vide ante, Pt. II. ch 1, § 8, p. 98.

Janeiro, in 1810, it was declared, "that the two powers have agreed on an alliance for defence, and reciprocal guarantee against every hostile attack, conformably to the treaties already subsisting between them, the stipulations of which shall remain in full force, and are renewed by the present treaty in their fullest and most extensive interpretation." This treaty confirms the stipulation of Great Britain to acknowledge no other sovereign of Portugal but the heir of the House of Braganza. The Treaty of Vienna, of the 22d January, 1815, between Great Britain and Portugal, contains the following article: — "The treaty of alliance at Rio Janeiro, of the 19th February, 1810, being founded on temporary circumstances, which have happily ceased to exist, the said treaty is hereby declared to be of no effect; without prejudice, however, to the ancient treaties of alliance, friendship, and guarantee, which have so long and so happily subsisted between the two crowns, and which are hereby renewed by the high contracting parties, and acknowledged to be of full force and effect."

Such was the nature of the compacts of alliance and guarantee subsisting between Great Britain and Portugal, at the time when the interference of Spain in the affairs of the latter kingdom compelled the British government to interfere, for the protection of the Portuguese nation against the hostile designs of the Spanish court. In addition to the grounds stated in the British Parliament, to justify this counteracting interference, it was urged, in a very able article on the affairs of Portugal, contemporaneously published in the Edinburgh Review, that although, in general, an alliance for defence and guarantee does not impose any obligation, nor, indeed, give any warrant to interfere in intestine divisions, the peculiar circumstances of the case did constitute the *casus fœderis* contemplated by the treaties in question. A defensive alliance is a contract between several States, by which they agree to aid each other in their defensive (or, in other words, in their just) wars against other States. Morally speaking, no other species of alliance is just, because no other species of war can be just. The simplest case of defensive war is, where our ally is openly invaded with military force, by a power to whom she has given no just cause of war. If France or Spain, for instance, had marched an army into Portugal to subvert its constitutional government, the duty of England would

have been too evident to render a statement of it necessary. But this was not the only case to which the treaties were applicable. If troops were assembled and preparations made, with the manifest purpose of aggression against an ally; if his subjects were instigated to revolt, and his soldiers to mutiny; if insurgents on his territory were supplied with money, with arms, and military stores; if, at the same time, his authority were treated as an usurpation, and all participation in the protection granted to other foreigners refused to the well-affected part of his subjects, while those who proclaimed their hostility to his person were received as the most favored strangers; in such a combination of circumstances, it could not be doubted that the case foreseen by defensive alliances would arise, and that he would be entitled to claim that succor, either general or specific, for which his alliances had stipulated. The wrong would be as complete, and the danger might be as great, as if his territory were invaded by a foreign force. The mode chosen by his enemy might even be more effectual, and more certainly destructive, than open war. Whether the attack made on him be open or secret, if it be equally unjust, and expose him to the same peril, he is equally authorized to call for aid. All contracts, under the law of nations, are interpreted as extending to every case manifestly and certainly parallel to those cases for which they provide by express words. In that law, which has no tribunal but the conscience of mankind, there is no distinction between the evasion and the violation of a contract. It requires aid against disguised as much as against avowed injustice; and it does not fall into so gross an absurdity as to make the obligation to succor less where the danger is greater. The only rule for the interpretation of defensive alliances seems to be, that every wrong which gives to one ally a just cause of war entitles him to succor from the other ally. The right to aid is a secondary right, incident to that of repelling injustice by force. Wherever he may morally employ his own strength for that purpose, he may, with reason, demand the auxiliary strength of his ally.[1]

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[1] Vattel's reasoning is still more conclusive in a case of guarantee: — "Si l'alliance défensive porte une guarantie de toutes les terres que l'allié possède actuellement, le *casus fœderis* se déploie toutes les fois que ces terres sont envahies *ou menaçées d'invasion*." Liv. iii. ch. 6, § 91.

Fraud neither gives nor takes away any right. Had France, in the year 1715, assembled squadrons in her harbors and troops on her coasts; had she prompted and distributed writings against the legitimate government of George I.; had she received with open arms battalions of deserters from his troops, and furnished the army of the Earl of Mar with pay and arms when he proclaimed the Pretender; Great Britain, after demand and refusal of reparation, would have had a perfect right to declare war against France, and, consequently, as complete a title to the succor which the States-General were bound to furnish, by their treaties of alliance and guarantee of the succession of the House of Hanover, as if the pretended king, James III., at the head of the French army, were marching on London. The war would be equally defensive on the part of England, and the obligation equally incumbent on Holland. It would show a more than ordinary defect of understanding, to confound a war defensive in its *principles* with a war defensive in its *operations*. Where attack is the best mode of providing for the defence of a State, the war is defensive in principle, though the operations are offensive. Where the war is unnecessary to safety, its *offensive* character is not altered; because the wrongdoer is reduced to defensive warfare. So a State, against which dangerous wrong is manifestly meditated, may prevent it by striking the first blow, without thereby waging a war in its principle offensive. Accordingly, it is not every attack made on a State that will entitle it to aid under a defensive alliance; for if that State had given just cause of war to the invader, the war would not be, on its part, defensive in principle.[1]

§ 16. Hostages for the execution of treaties.

The execution of a treaty is sometimes secured by *hostages* given by one party to the other. The most recent and remarkable example of this practice occurred at the peace of Aix-la-Chapelle, in 1748; where the restitution of Cape Breton, in North America, by Great Britain to France, was secured by several British peers sent as hostages to Paris.[2]

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[1] "Dans une allianee défensive le *casus fœderis* n'existe pas tout de suite dès que notre allié est attaqué. Il faut voir encore s'il n'a point donné à son ennemi un juste sujet de lui faire la guerre. S'il est dans le tort, il faut l'engager à donner une satisfaction raisonnable." Vattel, liv. iii. ch. 6, § 90.

[2] Vattel, liv. ii. ch. 16, §§ 245–261.

§ 17. Interpretation of treaties.

Public treaties are to be interpreted like other laws and contracts. Such is the inevitable imperfection and ambiguity of all human language, that the mere words alone of any writing, literally expounded, will go a very little way towards explaining its meaning. Certain technical rules of interpretation have, therefore, been adopted by writers on ethics and public law, to explain the meaning of international compacts, in cases of doubt. These rules are fully expounded by Grotius and his commentators; and the reader is referred especially to the principles laid down by Vattel and Rutherforth, as containing the most complete view of this important subject.[1]

§ 18. Mediation.

Negotiations are sometimes conducted under the mediation of a third power, spontaneously tendering its good offices for this purpose, or upon the request of one or both of the litigating powers, or in virtue of a previous stipulation for that purpose. If the mediation is spontaneously offered, it may be refused by either party; but if it is the result of a previous agreement between the two parties, it cannot be refused without a breach of good faith. When accepted by both parties, it becomes the right and the duty of the mediating power to interpose its advice, with a view to the adjustment of their differences. It thus becomes a party to the negotiation, but has no authority to constrain either party to adopt its opinion. Nor is it obliged to guarantee the performance of the treaty concluded under its mediation, though, in point of fact, it frequently does so.[2]

§ 19. Diplomatic history.

The art of negotiation seems, from its very nature, hardly capable of being reduced to a systematic science. It depends essentially on personal character and qualities, united with a knowledge of the world and experience in business. These talents may be strengthened by the study of history, and especially the history of diplomatic negotiations; but the want of them can hardly be supplied by any knowledge derived

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[1] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 16. Vattel, liv. ii. ch. 17. Rutherforth's Inst. b. ii. ch. 7.

[2] Klüber, Droit des Gens Moderne de l'Europe. Pt. II. tit. 2, § 1; ch. 2, § 160.

merely from books. One of the earliest works of this kind is that commonly called *Le Parfait Ambassadeur*, originally published in Spanish by Don Antonio de Vera, long time ambassador of Spain at Venice, who died in 1658. It was subsequently published by the author in Latin, and different translations appeared in Italian and French. Wicquefort's book, published in 1679, under the title of *L'Ambassadeur et ses Fonctions*, although its principal object is to treat of the rights of legation, contains much valuable information upon the art of negotiation. Callieres, one of the French plenipotentiaries at the Treaty of Ryswick, published, in 1716, a work entitled *De la Manière de Negocier avec les Souverains*, which obtained considerable reputation. The Abbé Mably also attempted to treat this subject systematically, in an essay entitled *Principes des Negotiations*, which is commonly prefixed as an introduction to his *Droit Publique de l'Europe*, in the various editions of the works of that author. A catalogue of the different histories which have appeared of particular negotiations would be almost interminable, but nearly all that is valuable in them will be found collected in the excellent work of M. Flassan, entitled *L'Histoire de la Diplomatie Française*. The late Count de Ségur's compilation from the papers of Favier, one of the principal secret agents employed in the double diplomacy of Louis XV., entitled *Politique de tous les Cabinets de l'Europe pendant les Règnes de Louis XV. et de Louis XVI.*, with the notes of the able and experienced editor, is a work which also throws great light upon the history of French diplomacy. A history of treaties, from the earliest times to the Emperor Charlemagne, collected from the ancient Latin and Greek authors, and from other monuments of antiquity, was published by Barbeyrac, in 1739.[1] It had been preceded by the immense collection of Dumont, embracing all the public treaties of Europe, from the age of Charlemagne to the commencement of the eighteenth century.[2] The best collections of the more modern European treaties are those published at different periods

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[1] Histoire des Anciens Traités, par Barbeyrac, forming the 5th vol. of Dumont's Supplement au Corps Diplomatique.

[2] Corps Universel Diplomatique du Droit des Gens, &c., 8 tomes fol. Amsterd. 1726–1731. Supplement au Corps Universel Diplomatique, 5 tomes fol. 1739.

by Professor Martens, of Göttingen, including the most important public acts upon which the present conventional law of Europe is founded. To these may be added Koch's *Histoire abregée des Traités de Paix depuis la Paix de Westphalie*, continued by Schöell. A complete collection of the proceedings of the Congress of Vienna has also been published in German, by Klüber.[1]

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[1] Acten des Wiener Congresses in den Jahren, 1814 und 1815; von J. L. Klüber. Erlangen, 1815 und 1816: 6 Bde. 8vo.

PART FOURTH.

INTERNATIONAL RIGHTS OF STATES IN THEIR HOSTILE RELATIONS.

PART FOURTH.

INTERNATIONAL RIGHTS OF STATES IN THEIR HOSTILE RELATIONS.

CHAPTER I.

COMMENCEMENT OF WAR, AND ITS IMMEDIATE EFFECTS.

§ 1. Redress by forcible means between nations.

The independent societies of men, called States, acknowledge no common arbiter or judge, except such as are constituted by special compact. The law by which they are governed, or profess to be governed, is deficient in those positive sanctions which are annexed to the municipal code of each distinct society. Every State has therefore a right to resort to force, as the only means of redress for injuries inflicted upon it by others, in the same manner as individuals would be entitled to that remedy were they not subject to the laws of civil society. Each State is also entitled to judge for itself, what are the nature and extent of the injuries which will justify such a means of redress.

Among the various modes of terminating the differences between nations, by forcible means short of actual war, are the following: —

1. By laying an embargo or sequestration on the ships and goods, or other property of the offending nation, found within the territory of the injured State.

2. By taking forcible possession of the thing in controversy, by securing to yourself by force, and refusing to the other nation, the enjoyment of the right drawn in question.

3. By exercising the right of vindictive retaliation, (*retorsio facti,*) or of amicable retaliation, (*rétorsion de droit*); by which

last, the one nation applies, in its transactions with the other, the same rule of conduct by which that other is governed under similar circumstances.

4. By making reprisals upon the persons and things belonging to the offending nation, until a satisfactory reparation is made for the alleged injury.[1]

§ 2. Reprisals.

This last seems to extend to every species of forcible means for procuring redress, short of actual war, and, of course, to include all the others above enumerated. Reprisals are *negative*, when a State refuses to fulfil a perfect obligation which it has contracted, or to permit another nation to enjoy a right which it claims. They are *positive*, when they consist in seizing the persons and effects belonging to the other nation, in order to obtain satisfaction.[2]

Reprisals are also either *general* or *special*. They are *general*, when a State which has received, or supposes it has received, an injury from another nation, delivers commissions to its officers and subjects to take the persons and property belonging to the other nation, wherever the same may be found. It is, according to present usage, the first step which is usually taken at the commencement of a public war, and may be considered as amounting to a declaration of hostilities, unless satisfaction is made by the offending State. *Special* reprisals are, where letters of marque are granted, in time of peace, to particular individuals who have suffered an injury from the government or subjects of another nation.[3]

Reprisals are to be granted only in case of a clear and open denial of justice. The right of granting them is vested in the sovereign or supreme power of the State, and, in former times, was regulated by treaties and by the municipal ordinances of different nations. Thus, in England, the statute of 4 Hen. V., cap. 7, declares, "That if any subjects of the realm are oppressed in time of peace by any foreigners, the king will grant marque in due form to all that feel themselves grieved;" which form is

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1 Vattel, liv. ii. ch. 18. Klüber, Droit des Gens Moderne de l'Europe, § 234.

2 Klüber, § 234, Note (*c*).

3 Bynkershoek, Quæst. Jur. Pub. lib. i. Duponceau's Transl. p. 182, Note.

specially pointed out, and directed to be observed in the statute. So, also, in France, the celebrated marine ordinance of Louis XIV., of 1681, prescribed the forms to be observed for obtaining special letters of marque by French subjects against those of other nations; but these special reprisals in time of peace have almost entirely fallen into disuse.[1]

§ 3. Effect of reprisals.

Any of these acts of reprisal, or resort to forcible means of redress between nations, may assume the character of war in case adequate satisfaction is refused by the offending State. "Reprisals," says Vattel, "are used between nation and nation, in order to do themselves justice when they cannot otherwise obtain it. If a nation has taken possession of what belongs to another, if it refuses to pay a debt, to repair an injury, or to give adequate satisfaction for it, the latter may seize something belonging to the former, and apply it to its own advantage, till it obtains payment of what is due, together with interest and damages; or keep it as a pledge till the offending nation has refused ample satisfaction. The effects thus seized are preserved, while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears they are confiscated, and then reprisals are accomplished. If the two nations, upon this ground of quarrel, come to an open rupture, satisfaction is considered as refused from the moment that war is declared, or hostilities commenced; and then, also, the effects seized may be confiscated."[2]

§ 4. Embargo previous to declaration of hostilities.

Thus, where an embargo was laid on Dutch property in the ports of Great Britain, on the rupture of the peace of Amiens, in 1803, under such circumstances as were considered by the British government as constituting a hostile aggression on the part of Holland, Sir W. Scott, (Lord Stowell,) in delivering his judgment in this case, said, that "the seizure was at first equivocal; and if the matter in dispute had

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[1] Vattel, Droit des Gens, liv. ii. ch. 18, §§ 342-346. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 24. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. viii. ch. 2, § 260. Martens, Essai concernant les Armateurs, § 4.

[2] Vattel, Droit des Gens, liv. ii. ch. 18, § 342.

terminated in reconciliation, the seizure would have been converted into a mere civil embargo, so terminated. Such would have been the retroactive effect of that course of circumstances. On the contrary, if the transaction end in hostility, the retroactive effect is exactly the other way. It impresses the direct hostile character upon the original seizure; it is declared to be no embargo; it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus* by which it is done; that it was done *hostili animo*, and it is to be considered as a hostile measure, *ab initio*, against persons guilty of injuries which they refuse to redeem, by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restoration of such property, taken before a formal declaration of hostilities."[1]

§ 5. Right of making war, in whom vested.

The right of making war, as well as of authorizing reprisals, or other acts of vindictive retaliation, belongs, in every civilized nation, to the supreme power of the State. The exercise of this right is regulated by the fundamental laws or municipal constitution in each country, and may be delegated to its inferior authorities in remote possessions, or even to a commercial corporation — such, for example, as the British East India Company — exercising, under the authority of the State, sovereign rights in respect to foreign nations.[2]

§ 6. Public or solemn war.

A contest by force between independent sovereign States is called a public war. If it is declared in form, or duly commenced, it entitles both the belligerent parties to all the rights of war against each other. The voluntary or positive law of nations makes no distinction, in this respect, between a just and an unjust war. A war in form, or duly commenced, is to be considered, as to its effects, as just on both sides. Whatever is permitted by the laws of war to one of the belligerent parties is equally permitted to the other.[3]

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1 Robinson's Adm. Rep. vol. v. p. 246. The Boedes Lust.

2 Vattel, liv. iii. ch. 1, § 4. Martens, Précis, &c. liv. viii. ch. 2, §§ 260, 264.

3 Vattel, Droit des Gens, liv. iii. ch. 12. Rutherforth, Inst. b. ii. ch. 9, § 15.

§ 7. Perfect or imperfect war.

A *perfect* war is where one whole nation is at war with another nation, and all the members of both nations are authorized to commit hostilities against all the members of the other, in every case and under every circumstance permitted by the general laws of war. An *imperfect* war is limited as to places, persons, and things.[1]

A civil war between the different members of the same society is what Grotius calls a *mixed* war; it is, according to him, *public* on the side of the established government, and *private* on the part of the people resisting its authority. But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations.[2]

§ 8. Declaration of war, how far necessary.

A formal declaration of war to the enemy was once considered necessary to legalize hostilities between nations. It was uniformly practised by the ancient Romans, and by the States of modern Europe until about the middle of the seventeenth century. The latest example of this kind was the declaration of war by France against Spain, at Brussels, in 1635, by heralds at arms, according to the forms observed during the middle age. The present usage is to publish a manifesto, within the territory of the State declaring war, announcing the existence of hostilities, and the motives for commencing them. This publication may be necessary for the instruction and direction of the subjects of the belligerent State in respect to their intercourse with the enemy, and regarding certain effects which the voluntary law of nations attributes to war in form. Without such a declaration, it might be difficult to distinguish in a treaty of peace those acts which are to be accounted lawful effects of war, from those which either nation may consider as naked wrongs, and for which they may, under certain circumstances, claim reparation.[3]

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[1] Such were the limited hostilities authorized by the United States against France in 1798. Dallas' Rep. vol. ii. p. 21; vol. iv. p. 37.

[2] Vide ante, Pt. I. ch. 2, §§ 7–10, pp. 31–35.

[3] Grotius, de Jur. Bel. ac Pac. lib. i. cap. 3, § 4. Bynkershoek, Quæst. Jur.

§ 9. Enemy's property found in the territory on the commencement of war, how far liable to confiscation.

As no declaration, or other notice to the enemy, of the existence of war, is necessary, in order to legalize hostilities, and as the property of the enemy is, in general, liable to seizure and confiscation as prize of war, it would seem to follow as a consequence, that the property belonging to him and found within the territory of the belligerent State at the commencement of hostilities, is liable to the same fate with his other property wheresoever situated. But there is a great diversity of opinions upon this subject among institutional writers, and the tendency of modern usage between nations seems to be, to exempt such property from the operations of war.

One of the exceptions to the general rule, laid down by the text writers, which subjects all the property of the enemy to capture, respects property locally situated within the jurisdiction of a neutral State; but this exemption is referred to the right of the neutral State, not to any privilege which the situation gives to the hostile owner. Does reason, or the approved practice of nations, suggest any other exception?

With the Romans, who considered it lawful to enslave, or even to kill an enemy found within the territory of the State on the breaking out of war, it would very naturally follow that his property found in the same situation would become the spoil of the first taker. Grotius, whose great work on the laws of war and peace appeared in 1625, adopts as the basis of his opinion upon this question the rules of the Roman law, but qualifies them by the more humane sentiments which began to prevail in the intercourse of mankind at the time he wrote. In respect to debts, due to private persons, he considers the right to demand them as suspended only during the war, and reviving with the peace. Bynkershoek, who wrote about the year 1737, adopts the same rules, and follows them to all their consequences. He holds that, as no declaration of war to the enemy is necessary, no notice is necessary to legalize the capture of his property, un-

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Pub. lib. i. cap. 2. Rutherforth's Inst. b. ii. ch. 9, § 10. Vattel, Droit des Gens, liv. iii. ch. 4, §§ 51–56. Klüber, Droit des Gens Moderne de l'Europe, §§ 238, 239.

less he has, by express compact, reserved the right to withdraw it on the breaking out of hostilities. This rule he extends to things in action, as debts and credits, as well as to things in possession. He adduces, in confirmation of this doctrine, a variety of examples from the conduct of different States, embracing a period of something more than a century, beginning in the year 1556 and ending in 1657. But he acknowledges that the right had been questioned, and especially by the States-General of Holland; and he adduces no precedent of its exercise later than the year 1667, seventy years before his publication. Against the ancient examples cited by him, there is the negative usage of the subsequent period of nearly a century and a half previously to the wars of the French revolution. During all this period, the only exception to be found is the case of the Silesian loan, in 1753. In the argument of the English civilians against the reprisals made by the King of Prussia in that case, on account of the capture of Prussian vessels by the cruisers of Great Britain, it is stated that "it would not be easy to find an instance where a prince had thought fit to make reprisals upon a debt due from himself to private men. There is a confidence that this will not be done. A private man lends money to a prince upon an engagement of honor; because a prince cannot be compelled, like other men, by a court of justice. So scrupulously did England and France adhere to this public faith, that even during the war," (alluding to the war terminated by the peace of Aix-la-Chapelle,) "they suffered no inquiry to be made whether any part of the public debt was due to the subjects of the enemy, though it is certain many English had money in the French funds, and many French had money in ours."[1]

Vattel, who wrote about twenty years after Bynkershoek, after laying down the general principle, that the property of the enemy is liable to seizure and confiscation, qualifies it by the exception of real property (*les immeubles*) held by the enemy's subjects within the belligerent State, which having been acquired by

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[1] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 20, § 16. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 2, 7. Letters of Camillus, by A. Hamilton, No. 20.

Vattel calls the Report of the English civilians "un excellent morceau de droit des gens," (liv. ii. ch. 7, § 34, Note *a*;) and Montesquieu terms it "une réponse sans réplique." Œuvres, tom. vi. p. 445.

the consent of the sovereign, is to be considered as on the same footing with the property of his own subjects, and not liable to confiscation *jure belli*. But he adds that the rents and profits may be sequestrated, in order to prevent their being remitted to the enemy. As to debts, and other things in action, he holds that war gives the same right to them as to the other property belonging to the enemy. He then quotes the example referred to by Grotius, of the hundred talents due by the Thebans to the Thessalians, of which Alexander had become master by right of conquest, but which he remitted to the Thessalians as an act of favor: and proceeds to state, that the "sovereign has naturally the same right over what his subjects may be indebted to the enemy; therefore he may confiscate debts of this nature, if the term of payment happen in time of war, or at least he may prohibit his subjects from paying while the war lasts. But at present, the advantage and safety of commerce have induced all the sovereigns of Europe to relax from this rigor. And as this custom has been generally received, he who should act contrary to it would injure the public faith; since foreigners have confided in his subjects only in the firm persuasion that the general usage would be observed. The State does not even touch the sums which it owes to the enemy; everywhere, in case of war, the funds confided to the public, are exempt from seizure and confiscation." In another passage, Vattel gives the reason of this exemption. "In reprisals, the property of subjects is seized, as well as that belonging to the sovereign or State. Every thing which belongs to the nation is liable to reprisals as soon as it can be seized, provided it be not a deposit confided to the public faith. This deposit being found in our hands only on account of that confidence which the proprietor has reposed in our good faith, ought to be respected even in case of open war. Such is the usage in France, in England, and elsewhere, in respect to money placed by foreigners in the public funds." Again he says: "The sovereign declaring war can neither detain those subjects of the enemy who were within his dominions at the time of the declaration, nor their effects. They came into this country on the public faith; by permitting them to enter his territories, and continue there, he has tacitly promised them liberty and perfect security for their return. He ought, then, to allow them a reasonable time to retire with their effects, and if they

remain beyond the time fixed, he may treat them as enemies; but only as enemies disarmed."[1]

It appears, then, to be the modern rule of international usage, that property of the enemy found within the territory of the belligerent State, or debts due to his subjects by the government or individuals, at the commencement of hostilities, are not liable to be seized and confiscated as prize of war. This rule is frequently enforced by treaty stipulations, but unless it be thus enforced, it cannot be considered as an inflexible, though an established rule. "The rule," as it has been beautifully observed, "like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign — it is a guide which he follows or abandons at his will; and although it cannot be disregarded by him without obloquy, yet it may be disregarded. It is not an immutable rule of law, but depends on political considerations, which may continually vary."[2]

§ 10. Rule of reciprocity.

Among these considerations is the conduct observed by the enemy. If he confiscates property found within his territory, or debts due to our subjects on the breaking out of war, it would certainly be just, and it may, under certain circumstances, be politic, to retort upon his subjects by a similar proceeding. This principle of reciprocity operates in many cases of international law. It is stated by Sir W. Scott to be the constant practice of Great Britain, on the breaking out of war, to condemn property seized before the war, if the enemy condemns, and to restore if the enemy restores. "It is," says he, "a principle sanctioned by that great foundation of the law of England, Magna Charta itself, which prescribes, that, at the commencement of a war, the enemy's merchants shall be kept and treated as our own merchants are kept and treated in their country."[3] And it is also stated in the report of the English civilians, in 1753, before referred to, in order to enforce their

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[1] Vattel, Droit des Gens, liv. ii. ch. 18, § 344; liv. iii. ch. 4, § 63; ch. 5, §§ 73–77.

[2] Mr. Chief Justice Marshall, in Brown *v.* the United States, Cranch's Rep. vol. viii. p. 110.

[3] Robinson's Adm. Rep. vol. i. p. 64. The Santa Cruz.

argument that the King of Prussia could not justly extend his reprisals to the Silesian loan, that "French ships and effects, wrongfully taken, after the Spanish war, and before the French war, have, during the heat of the war with France, and since, been restored by sentence of your Majesty's courts to the French owners. No such ships or effects ever were attempted to be confiscated as enemy's property, here, during the war; because, had it not been for the wrong first done, these effects would not have been in your Majesty's dominions."

§ 11. Droits of Admiralty.

The ancient law of England seems thus to have surpassed in liberality its modern practice. In the recent maritime wars commenced by that country, it has been the constant usage to seize and condemn as droits of admiralty the property of the enemy found in its ports at the breaking out of hostilities, and this practice does not appear to have been influenced by the corresponding conduct of the enemy in that respect. As has been observed by an English writer, commenting on the judgment of Sir W. Scott in the case of the Dutch ships, "there seems something of subtlety in the distinction between the virtual and the actual declaration of hostilities, and in the device of giving to the actual declaration a retrospective efficacy, in order to cover the defect of the virtual declaration previously implied." [1] (*a*)

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[1] Chitty's Law of Nations, ch. 3, p. 80.

(*a*) [Lorsque la guerre éclate entre deux puissances maritimes, il est de principe que les navires de commerce de l'une d'elles qui se trouvent dans les ports de l'autre ne peuvent être considérés comme des prises et qu'ils ont la faculté de se retirer pour rentrer dans leur pays; ce principe est consacré par un grand nombre de traités, dont plusieurs ont même fixé le délai pendant lequel ils peuvent jouir de cette immunité. Il est vrai que dans l'usage, les belligérants respectent rarement cette loi, et que souvent le premier acte de la guerre est de saisir tous les navires devenus ennemis, qui se trouvent dans les ports du belligérant, qui y sont venus sur la foi des traités et de la paix; mais cette violation de la foi publique, malheureusement trop fréquente, ne détruit pas la loi, loi incontestée et surtout incontestable. La raison qui a dicté ce principe pour les navires qui se trouvent dans le port devenu ennemi au moment de la déclaration de guerre, l'a fait étendre à ceux qui, étant en cours de navigation, à ce même moment sont rencontrés par des croiseurs à la haute mer; on leur accorde un délai suffisant pour se mettre en sûreté. A cet égard le droit n'est pas douteux, mais sur ce second point comme sur le premier, il faut avouer qu'il est très-rarement respecté, cepend-

Seizure of enemy's property found within the territorial limits of the belligerent State, on the declaration of war.

During the war between the United States and Great Britain, which commenced in 1812, it was determined by the Supreme Court, that the enemy's property, found within the territory of the United States on the declaration of war, could not be seized and condemned as prize of war, without some legislative act expressly authorizing its confiscation. The court held that the

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ant il existe et les faits contraires ne peuvent le détruire. Hautefeuille, Droits des Nations Neutres, tom. iv. p. 267. The same rule M. Hautefeuille also applies to the case of neutrals, who may have contraband articles on board, or which have sailed in ignorance of the war, without the papers required during a war to establish their nationality. Among the treaties which he adduces as an evidence of the conventional law of nations on this point, are those concluded between France and England and France and Holland, at Utrecht, and which, confirmed by all subsequent treaties down to the period of the French revolution, are treated as declaratory of permanent principles. At the same time, the frequent infraction of the rule by Great Britain, including the capture of the French fishing vessels on the Bank of Newfoundland, in 1779, before a declaration of war, with her constant practice of seizing, as *droits* of admiralty, all vessels of the adverse belligerent, in her ports at the breaking out of hostilities, is adverted to.

Another French authority considers the immunity, at the commencement of the war, of individuals from being made prisoners and of vessels from being confiscated in the enemy's territory, to stand on an equal footing. "Ainsi le souverain qui déclare la guerre ou à qui elle est déclarée ne peut retenir prisonniers les sujets de l'ennemi qui se trouvent dans ses états au moment de la déclaration, non plus que leurs effets mobiliers." Massé, Droit Commercial, liv. ii. tit. i. ch. 2, § 1. "Ainsi que nous l'avons vu, un état belligérant ne peut retenir dans ses ports les bâtimens ennemis qui s' y trouvent au moment de la déclaration de guerre. On doit lui assigner un délai suffisant pour se retirer. La même, § 2. To the same effect, Azuni, Droit Maritime de l'Europe, § 7, p. 267, and De Stack, Essais, p. 30, as cited by Hautefeuille.

The English text writers, to the time of the present war, continued to maintain the existence of the right to seize, according to their former usage, on the authority of the crown, and without any express act of Parliament to sanction it, enemy's property, which had come within their control on the faith of a different state of political relations. One of those specially invokes as authorities for this position Chancellor Kent, (Kent's Commentaries, vol. i. p. 59,) and the decision of the Supreme Court of the United States, in Brown *v.* The United States, (Cranch's Rep. vol. 8, p. 110,) which is the case quoted at length, by Mr. Wheaton, in the text, and the one to which Chancellor Kent also refers. Manning's Commentaries on the Law of Nations, p. 127. As to the case from Cranch's Reports, Mr. Manning omits to notice the fact that the sentence of the court below, condemning the property, was annulled and reversed, and that it was decided, that, owing to the distribution of powers under our Constitution, to render effective the belligerent

law of Congress declaring war was not such an act. That declaration did not, by its own operation, so vest the property of

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right to seize enemy's property found in the United States at the commencement of the war, an express act of Congress, which had never been passed, was requisite, and that its confiscation was not a necessary consequence of the declaration of war, without further legislation.

Among other modifications of the course adopted by England, during the wars consequent on the French revolution, by which her former practice has been altered to conform to that proclaimed by France, and which, in this particular, is similar to that pursued by Turkey and Russia, may be noticed the orders issued by the two great maritime allies, in reference not only to the vessels belonging to their enemy's subjects, which were in their ports at the declaration of the war, but to all other Russian vessels, which had left their own country, before they were apprized of the hostilities, and had not reached their destination.

The Paris *Moniteur*, of March 28, 1854, contained the following declaration, which was issued in accordance with England, by whose government an Order in Council, to the same effect, was promulgated, bearing date the 29th of March: —

"Article 1. Six weeks from the present date are granted to Russian ships of commerce to quit the ports of France. Those Russian ships which are not actually in our ports, or which may have left the ports of Russia previously to the declaration of war, may enter into the French ports, and remain there for the completion of their cargoes until the 9th of May, inclusive.

"Article 2. Those vessels which shall be captured by French cruisers after having left the Russian ports, shall be released if they can establish, by the ship's papers, that they were proceeding direct to the place of destination, and had not yet arrived there. DROUYN DE L'HUYS.

PARIS, March 27, 1854."

The *Moniteur* also announced that the subjects of Russia may continue their residence in France, under the protection which the law provides for foreigners, the only condition being that they respect those laws.

Further indulgencies, in connection with the recognition of neutral rights, were subsequently granted by both governments, to the effect of the subjoined Order in Council, which was officially communicated by the British Minister to the American Secretary of State, on the 9th of May: —

"*At the Court of Windsor, the 15th day of April, 1854, present, the Queen's Most Excellent Majesty in Council.*

"Whereas, by an order of her Majesty in council, of the 29th of March last, it was, among other things, ordered "that any Russian merchant vessel which, prior to the date of this order, shall have sailed from any foreign port, bound for any port or place in her Majesty's dominions, shall be permitted to enter such port or place and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met with by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded;

"And whereas her Majesty, by and with the advice and consent of her said council, is now pleased to alter and extend such part of the said order, it is hereby

the enemy in the government, as to support judicial proceedings for its seizure and confiscation. It vested only a right to confis-

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ordered, by and with such advice as aforesaid, as follows: that is to say that any Russian merchant vessel which, prior to the 15th day of May, 1854, shall have sailed from any port of Russia situated either in or upon the shores or coasts of the Baltic Sea or of the White Sea, bound for any port or place in her Majesty's dominions, shall be permitted to enter such last-mentioned port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.

"And her Majesty is pleased, by and with the advice aforesaid, further to order, and it is hereby ordered, that in all other respects her Majesty's aforesaid order in council, of the 29th day of March last, shall be and remain in full force, effect, and operation." London Gazette, 18th April, 1854. Mr. Crampton to Mr. Marcy, 9th May, 1854. Cong. Doc., 33 Cong. 1 Sess. H. R., No. 103, p. 5.

Similar orders were issued by the French government, but it was subsequently explained that the relaxation was restricted to Russian vessels destined to and leaving English or French ports, and was not intended to apply to those leaving neutral ports. Circulaire du Ministre de la Marine, Annuaire, &c., 1853–4, App. p. 913.

On occasion of the declaration of war by the Ottoman Porte against Russia, in October, 1853, and which preceded, several months, the hostilities of England and France with the latter power, a notice was issued by the Russian government to the effect that, as the Ottoman Porte had not imposed an embargo on Russian ships in its ports, and had promised to grant them sufficient delay to repair to their destination, and also not to oppose the free passage of the ships of friendly nations through the Straits to the Black Sea, the Russian government, on its part, grants liberty to the Turkish vessels in its ports to return to their destination till the 10th (22d) of November, and that, even after that date, Turkish vessels loaded on neutral account, if met at sea, might proceed to the port of destination with their cargoes, in case their papers proved that they were loaded before the time mentioned. The notice in other respects conforms the action of the Russian government to that of Turkey, authorizing the capture and condemnation of neutral goods found in enemy's vessels, and allowing entire freedom of commerce to neutral vessels. Avis du Ministre des Finances dans le Journal de St. Petersbourg, le 25 Octobre, (6 Novembre) 1853. Id. App. p. 926.

But after the declarations of war by England and France against Russia, the Russian Minister of Finance published a notice in the *Gazette du Commerce*, on 19th of April, 1854, allowing English and French vessels six weeks from the 25th of April to take on board their cargoes and sail from Russian ports in the Black Sea, the Sea of Azoff, and the Baltic, and six weeks, from the opening of navigation, to leave the ports of the White Sea. The notice also declared that enemy's property in neutral bottoms would be regarded as inviolable, and might be imported, and that the property of neutral powers on board of enemy's ships would not be subject to confiscation, except articles contraband of war, the carrying of which

cate, the assertion of which depended on the will of the sovereign power.

The judgment of the court stated, that the universal practice of forbearing to seize and confiscate debts and credits, the principle universally received, that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but that it simply confers the right of confiscation.

Between debts contracted under the faith of laws, and property acquired in the course of trade on the faith of the same laws, reason draws no distinction; and although, in practice, vessels with their cargoes found in port at the declaration of war may have been seized, it was not believed that modern usage would sanction the seizure of the goods of an enemy on land, which were acquired in peace in the course of trade. Such a proceeding was rare, and would be deemed a harsh exercise of the rights of war. But although the practice in this respect might not be uniform, that circumstance did not essentially affect the question. The inquiry was, whether such property vests in the sovereign by the mere declaration of war, or remains subject to a right of confiscation, the exercise of which depends upon the national will: and the rule which applies to one case, so far as respects the operation of a declaration of war on the thing itself, must apply to all others over which war gives an equal right. The right of the sovereign to confiscate debts being precisely the same with the right to confiscate other property found in the country, the operation of a declaration of war on debts, and on other property found within the country must be the same.

Even Bynkershoek, who maintains the broad principle, that in war every thing done against an enemy is lawful; that he may be destroyed, though unarmed and defenceless; that fraud, or even poison, may be employed against him; that a most unlimited right is acquired to his person and property; admits that

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would render even a neutral vessel a good prize. It was further provided that English and French vessels if met at sea, after the time limited, might continue their voyages, if their papers showed that their cargoes had been taken on board before the expiration of the prescribed period. Id. App. p. 928. Vide infra, Part IV. c. 3, § 23, note.]

war does not transfer to the sovereign a debt due to his enemy; and, therefore, if payment of such debt be not exacted, peace revives the former right of the creditor; "because," he says, "the occupation which is had by war consists more in fact than in law." He adds to his observations on this subject: "Let it not, however, be supposed that it is only true of actions that they are not condemned *ipso jure*, for other things also belonging to the enemy may be concealed and escape confiscation." [1]

Vattel says, that "the sovereign can neither detain the persons nor the property of those subjects of the enemy, who are within his dominions at the time of the declaration."

It was true that this rule was, in terms, applied by Vattel to the property of those only who are personally within the territory at the commencement of hostilities; but it applied equally to things in action and to things in possession; and if war did, of itself, without any further exercise of the sovereign will, vest the property of the enemy in the sovereign, the presence of the owner could not exempt it from this operation of war. Nor could a reason be perceived for maintaining that the public faith is more entirely pledged for the security of property, trusted in the territory of the nation in time of peace, if it be accompanied by its owner, than if it be confided to the care of others.

The modern rule, then, would seem to be, that tangible property belonging to an enemy, and found in the country at the commencement of war, ought not to be immediately confiscated;

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[1] Quod dixi de actionibus recte publicandis, ita demum obtinet, si, quod subditi nostri hostibus nostris debent, princeps a subditis suis reverà exegerit. Si exegerit, rectè solutum est, si non exegerit, pace factâ reviviscit jus pristinum creditoris, quia occupatio, quæ bello fit, magis in facto, quam in potestate juris consistit. Nomina igitur, non exacta tempore belli quodammodo intermori videntur, sed per pacem, genere quodam postliminii, ad priorem dominum reverti. Secundum hæc inter gentes ferè convenit, ut nominibus bello publicatis, pace deinde factâ, exacta censeantur periisse, et maneant extincta, non autem exacta reviviscant, et restituantur veris creditoribus. . . . . Noli autem existimare, de actionibus duntaxat verum esse, eas ipso jure non publicari, nam nec alia quæque publicantur, quæ apud hostes, sunt et ibi fortè celantur. Unde et ea, quæ apud hostes ante bellum exortum habebamus, indictoque bello suppressa erant, atque ita non publicata, si a nostris denuo recuperentur, non fieri recuperantium, sed pristinis dominis restitui, rectè responsum est. Consil. Belg. t. iii. Consil. 67." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. vii.

and in almost every commercial treaty an article is inserted, stipulating for the right to withdraw such property.

This rule appeared to be totally incompatible with the idea, that war does, of itself, vest the property in the belligerent government. It might be considered as the opinion of all who have written on the *jus belli*, that war gives the right to confiscate, but does not itself confiscate, the property of the enemy; and the rules laid down by these writers went to the exercise of this right.

The Constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world. In expounding that constitution, a construction ought not lightly to be admitted, which would give to a declaration of war an effect in this country it did not possess elsewhere, and which would fetter the exercise of that entire discretion respecting enemy's property, which might enable the government to apply to the enemy the rule which he applied to us.

This general reasoning would be found to be much strengthened by the words of the Constitution itself — That the declaration of war had only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results — such as a transfer of property — which are usually produced by ulterior measures of government, was fairly deducible from the enumeration of powers which accompanied that of declaring war: — "Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

It would be restraining this clause within narrower limits than the words themselves import, to say that the power to make rules concerning captures on land and water was to be confined to captures which are extraterritorial. If it extended to rules respecting enemy's property found within the territory, then the Court perceived an express grant to Congress of the power in question as an independent substantive power, not included in that of declaring war.

The acts of Congress furnished many instances of an opinion, that the declaration of war does not, of itself, authorize proceedings against the persons or property of the enemy, found at the time within the territory.

War gives an equal right over persons and property; and if

its declaration was not considered as prescribing a law respecting the person of an enemy found in our country, neither did it prescribe a law for his property. The act concerning alien enemies, which conferred on the President very great discretionary powers respecting their persons, afforded a strong implication that he did not possess those powers by virtue of the declaration of war.

The act "for the safe keeping and accommodation of prisoners of war," was of the same character.

The act prohibiting trade with the enemy contained this clause: — "That the President of the United States be, and he is hereby authorized to give, at any time within six months after the passage of this act, passports for the safe transportation of any ship or other property belonging to British subjects, and which is now within the limits of the United States."

The phraseology of this law showed that the property of a British subject was not considered by the legislature as being vested in the United States by the declaration of war; and the authority which the act conferred on the President was manifestly considered as one which he did not previously possess.

The proposition that a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the belligerent, was believed to be entirely free from doubt. Was there in the Act of Congress, by which war was declared against Great Britain, any expression which would indicate such an intention?

That act, after placing the two nations in a state of war, authorizes the President to use the whole land and naval force of the United States, to carry the war into effect; and "to issue to private armed vessels of the United States commissions, or letters of marque and general reprisal, against the vessels, goods, and effects of the government of the United Kingdom of Great Britain and Ireland, and the subjects thereof."

That reprisals may be made on enemy's property found within the United States at the declaration of war, if such be the will of the nation, had been admitted; but it was not admitted that, in the declaration of war, the nation had expressed its will to that effect.

It could not be necessary to employ argument in showing, that when the Attorney for the United States institutes proceedings

at law for the confiscation of enemy's property found on land, or floating in one of our creeks, in the care and custody of one of our citizens, he is not acting under the authority of letters of marque and reprisal, still less under the authority of such letters issued to a private armed vessel.

The act "concerning letters of marque, prizes, and prize goods," certainly contained nothing to authorize that seizure.

There being no other Act of Congress which bore upon the subject, it was considered as proved that the legislature had not confiscated enemy's property, which was within the United States at the declaration of war, and that the sentence of condemnation, pronounced in the court below, could not be sustained.

One view, however, had been taken of this subject, which deserved to be further considered. It was urged that, in executing the laws of war, the executive may seize and the courts condemn all property which, according to the modern law of nations, is subject to confiscation; although it might require an act of the legislature to justify the condemnation of that property, which, according to modern usage, ought not to be confiscated.

This argument must assume for its basis that modern usage constitutes a rule which acts directly upon the thing itself, by its own force, and not through the sovereign power. This position was not allowed. This usage was a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, was addressed to the judgment of the sovereign; and although it could not be disregarded by him without obloquy, yet it might be disregarded.

The rule was, in its nature, flexible. It was subject to infinite modifications. It was not an immutable rule of law, but depended on political considerations, which might continually vary. Commercial nations, in the situation of the United States, had always a considerable quantity of property in the possession of their neighbors. When war breaks out, the question, what shall be done with enemy's property in our country, is a question rather of policy than of law. The rule which we apply to the property of our enemy, will be applied by him to the property of our citizens. Like all other questions of policy, it was proper

for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It was proper for the consideration of the legislature, not of the executive or judiciary. It appeared to the Court that the power of confiscating enemy's property was in the legislature, and that the legislature had not yet declared its will to confiscate property which was within our territory at the declaration of war.[1]

§ 12. Debts due to the enemy.

In respect to debts due to an enemy, previously to the commencement of hostilities, the law of Great Britain pursues a policy of a more liberal, or at least of a wiser character, than in respect to droits of admiralty. A maritime power, which has an overwhelming naval superiority, may have an interest, or may suppose it has an interest, in asserting the right of confiscating enemy's property, seized before an actual declaration of war; but a nation which, by the extent of its capital, must generally be the creditor of every other commercial country, can certainly have no interest in confiscating debts due to an enemy, since that enemy might, in almost every instance, retaliate with much more injurious effect. Hence, though the prerogative of confiscating such debts, and compelling their payment to the crown, still theoretically exists, it is seldom or ever practically exerted. The right of the original creditor to sue for the recovery of the debt is not extinguished; it is only suspended during the war, and revives, in full force, on the restoration of peace.[2]

Such, too, is the law and practice of the United States. The debts due by American citizens to British subjects before the war of the Revolution, and not actually confiscated, were judicially considered as revived, together with the right to sue for their recovery on the restoration of peace between the two countries. The impediments which had existed to the collection of British debts, under the local laws of the different States of the Confederation, were stipulated to be removed by the treaty of

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[1] Mr. Chief Justice Marshall, Cranch's Rep. vol. viii. pp. 123–129.

[2] Bosanquet & Puller's Rep. vol. iii. p. 191. Furtado *v.* Rodgers. Vesey Jun. Rep. vol. xiii. p. 71, *ex parte* Boussmaker. Edward's Adm. Rep. p. 60. The Nuestra Signora de los Dolores.

peace, in 1783; but this stipulation proving ineffectual for the complete indemnification of the creditors, the controversy between the two countries on this subject was finally adjusted, by the payment of a sum *en bloc* by the government of the United States, for the use of the British creditors. The commercial treaty of 1794 also contained an express declaration, that it was unjust and impolitic that private contracts should be impaired by national differences; with a mutual stipulation, that "neither the debts due from individuals of the one nation to individuals of the other, nor shares, nor moneys which they may have in the public funds, or in the public or private banks, shall ever, in any event of war, or national differences, be sequestered or confiscated.[1]

On the commencement of hostilities between France and Great Britain, in 1793, the former power sequestrated the debts and other property belonging to the subjects of her enemy, which decree was retaliated by a countervailing measure on the part of the British government. By the additional articles to the treaty of peace between the two powers, concluded at Paris, in April, 1814, the sequestrations were removed on both sides, and commissaries were appointed to liquidate the claims of British subjects for the value of their property unduly confiscated by the French authorities, and also for the total or partial loss of the debts due to them, or other property unduly retained under sequestration, subsequently to 1792. The engagement thus extorted from France may be considered as a severe application of the rights of conquest to a fallen enemy, rather than a measure of even-handed justice; since it does not appear that French property, seized in the ports of Great Britain and at sea, in anticipation of hostilities, and subsequently condemned as droits of admiralty, was restored to the original owners under this treaty, on the return of peace between the two countries.[2]

So, also, on the rupture between Great Britain and Denmark, in 1807, the Danish ships and other property, which had been seized in the British ports and on the high seas, before the actual declaration of hostilities, were condemned as droits of admiralty

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[1] Dallas's Rep. vol. iii. pp. 4, 5, 199–285.

[2] Martens, Nouveau Recueil, tom. ii. p. 16.

by the retrospective operation of the declaration. The Danish government issued an ordinance retaliating this seizure, by sequestrating all debts due from Danish to British subjects, and causing them to be paid into the Danish royal treasury. The English Court of King's Bench determined that this ordinance was not a legal defence to a suit in England for such a debt, not being conformable to the usage of nations; the text writers having condemned the practice, and no instance having occurred of the exercise of the right, except the ordinance in question, for upwards of a century. The soundness of this judgment may well be questioned. It has been justly observed, that between debts contracted under the faith of laws, and property acquired on the faith of the same laws, reason draws no distinction; and the right of the sovereign to confiscate debts is precisely the same with the right to confiscate other property found within the country on the breaking out of the war. Both require some special act expressing the sovereign will, and both depend, not on any inflexible rule of international law, but on political considerations, by which the judgment of the sovereign may be guided.[1] (*a*)

§ 13. Trading with the enemy, unlawful on the part of

One of the immediate consequences of the commencement of hostilities is, the interdiction of all commercial intercourse between the subjects of the States

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[1] Maule & Selwyn's Rep. vol. vi. p. 92. Wolff *v.* Oxholm. Cranch's Rep. vol. viii. p. 110. Brown *v.* The United States. [Thompson, Laws of War, p. 7.]

(*a*) [The property in Danish vessels and cargoes, condemned as droits of admiralty in 1807, and in retaliation of which the British debts were confiscated, was computed at £1,265,000. The debts due from Danish to British subjects, ordered to be paid into the treasury, amounted to only from £200,000 to £300,000. When Great Britain demanded the payment of this sum from the Danish government, the latter offered to deduct it from the value of the ships and other property condemned as above mentioned. This was declined; and the British government ultimately satisfied their own merchants, by an indemnity granted by Act of Parliament. "It is difficult," said Mr. Wheaton, writing in reference to this transaction, "to show a reasonable distinction between debts contracted under the public faith in time of peace, and property found in the enemy's territory on the breaking out of the war, or taken at sea before the declaration of hostilities." Mr. Wheaton to Mr. Forsyth, 29th November, 1834. MS. Despatches.]

subjects of the belligerent State.

at war, without the license of their respective governments. In Sir W. Scott's judgment, in the case of The Hoop, this is stated to be a principle of universal law, and not peculiar to the maritime jurisprudence of England. It is laid down by Bynkershoek as a universal principle of law. "There can be no doubt," says that writer, "that, from the nature of war itself, all commercial intercourse ceases between enemies. Although there be no special interdiction of such intercourse, as is often the case, commerce is forbidden by the mere operation of the law of war. Declarations of war themselves sufficiently manifest it, for they enjoin on every subject to attack the subjects of the other prince, seize on their goods, and do them all the harm in their power. The utility, however, of merchants, and the mutual wants of nations, have almost got the better of the law of war, as to commerce. Hence it is alternately permitted and forbidden in time of war, as princes think it most for the interests of their subjects. A commercial nation is anxious to trade, and accommodates the laws of war to the greater or lesser want that it may be in of the goods of others. Thus, sometimes a mutual commerce is permitted generally; sometimes as to certain merchandises only, while others are prohibited; and sometimes it is prohibited altogether. But in whatever manner it may be permitted, whether generally or specially, it is always, in my opinion, so far a suspension of the laws of war; and in this manner there is partly war and partly peace between the subjects of both countries."[1]

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[1] "Quamvis autem nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsæ indictiones bellorum satis declarant, quisque enim subditus jubetur alterius Principis subditos, eorumque bona aggredi, occupare, et quomodocumque iis nocere. Utilitas verò mercantium, et quòd alter populus alterius rebus indigeat, fere jus belli, quòd ad commercia, subegit. Hinc in quoque bello aliter atque aliter commercia permittuntur vetanturque, prout e re suâ subditorumque suorum esse censent Principes. Mercator populus studet commerciis frequentandis, et prout quisque alterius mercibus magis minusve carere potest, eò jus belli accomodat. Sic aliquando generaliter permittuntur mutua commercia, aliquando quòd ad certas merces, reliquis prohibitis, aliquando simpliciter et generaliter vetantur. Utcunque autem permittas, sive generaliter, sive specialiter, semper, si me audias, quoad hæc status belli suspenditur. Pro parte sic bellum, pro parte pax erit inter subditos utriusque Principis." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 3.

It appears from these passages to have been the law of Holland. Valin states it to have been the law of France, whether the trade was attempted to be carried on in national or neutral vessels; and it appears from a case cited (in The Hoop) to have been the law of Spain; and it may without rashness be affirmed to be a general principle of law in most of the countries of Europe.[1]

Sir W. Scott proceeds to state two grounds upon which this sort of communication is forbidden. The first is, that "by the law and constitution of Great Britain the sovereign alone has the power of declaring war and peace. He alone, therefore, who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient; but it is not for individuals to determine on the expediency of such occasions, on their own notions of commerce merely, and possibly on grounds of private advantage, not very reconcilable with the general interests of the State. It is for the State alone, on more enlarged views of policy, and of all the circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. No principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the State. Who can be insensible to the consequences that might follow, if every person in time of war had a right to carry on a commercial intercourse with the enemy, and, under color of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them (if necessary) under the eye and control of the government charged with the care of the public safety?

"Another principle of law, of a less politic nature, but equally general in its reception and direct in its application, forbids this

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[1] Valin, Comm. sur l'Ordonn. de la Marine, liv. iii. tit. 6, art. 3.

sort of communication, as fundamentally inconsistent with the relation existing between the two belligerent countries; and that is, the total inability to sustain any contract, by an appeal to the tribunals of the one country, on the part of the subjects of the other. In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*. A state in which contracts cannot be enforced, cannot be a state of legal commerce. If the parties who are to contract have no right to compel the performance of the contract, nor even to appear in a court of justice for that purpose, can there be a stronger proof that the law imposes a legal inability to contract? To such transactions it gives no sanction; they have no legal existence; and the whole of such commerce is attempted without its protection, and against its authority. Bynkershoek expresses himself with force upon this argument, in his first book, Chapter VII., where he lays down, that the legality of commerce and the mutual use of courts of justice are inseparable. He says that, in this respect, cases of commerce are undistinguishable from any other kind of cases: 'But if the enemy be once permitted to bring actions, it is difficult to distinguish from what causes they may arise; nor have I been able to observe that this distinction has ever been carried into practice.'"

Sir W. Scott then notices the constant current of decisions in the British Courts of Prize, where the rule had been rigidly enforced in cases where acts of parliament had, on different occasions, been made to relax the Navigation Law, and other revenue acts; where the government had authorized, under the sanction of an act of parliament, a homeward trade from the enemy's possessions, but had not specifically protected an outward trade to the same, though intimately connected with that homeward trade, and almost necessary to its existence; where strong claims, not merely of convenience, but of necessity, excused it on the part of the individual; where cargoes had been laden before the war, but the parties had not used all possible diligence to countermand the voyage, after the first notice of hostilities; and where it had been enforced, not only against British subjects, but also against those of its allies in the war, upon the supposition that the rule was founded upon a universal principle, which States allied in war had a right to notice and apply mutually to each other's subjects.

Such, according to this eminent civilian, are the general principles of the rule under which the public law of Europe, and the municipal law of its different States, have interdicted all commerce with an enemy. It is thus sanctioned by the double authority of public and of private jurisprudence; and is founded both upon the sound and salutary principle forbidding all intercourse with an enemy, unless by permission of the sovereign or State, and upon the doctrine that he who is *hostis* — who has no *persona standi in judicio*, no means of enforcing contracts, cannot make contracts, unless by such permission.[1]

Decisions of the American courts, as to trading with the public enemy.

The same principles were applied by the American courts of justice to the intercourse of their citizens with the enemy, on the breaking out of the late war between the United States and Great Britain. A case occurred in which a citizen had purchased a quantity of goods within the British territory, a long time previous to the declaration of hostilities, and had deposited them on an island near the frontier; upon the breaking out of hostilities, his agents had hired a vessel to proceed to the place of deposit, and bring away the goods; on her return she was captured, and, with the cargo, condemned as prize of war. It was contended for the claimant that this was not a trading, within the meaning of the cases cited to support the condemnation; that, on the breaking out of war, every citizen had a right, and it was the interest of the community to permit its members, to withdraw property purchased before the war, and lying in the enemy's country. But the Supreme Court determined, that whatever relaxation of the strict rights of war the more mitigated and mild practice of modern times might have established, there had been none on this subject. The universal sense of nations had acknowledged the demoralizing effects which would result from the admission of individual intercourse between the States at war. The whole nation is embarked in one common bottom, and must be reconciled to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because he is the enemy of his country. This being the duty of the citizen, what is the consequence of a breach of

[1] Robinson's Adm. Rep. vol. i. p. 196. The Hoop.

that duty? The law of prize is a part of the law of nations. By it a hostile character is attached to trade, independent of the character of the trader who pursues or directs it. Condemnation to the captor is equally the fate of the enemy's property, and of that found engaged in an anti-neutral trade. But a citizen or ally may be engaged in a hostile trade, and thereby involve his property in the fate of those in whose cause he embarks. This liability of the property of a citizen to condemnation, as prize of war, may likewise be accounted for on other considerations. Every thing that issues from a hostile country is, *primâ facie*, the property of the enemy; and it is incumbent upon the claimant to support the negative of the proposition. But if the claimant be a citizen, or an ally, at the same time that he makes out his interest he confesses the commission of an offence, which, under a well-known rule of the municipal law, deprives him of his right to prosecute his claim. Nor did this doctrine rest upon abstract reasoning only; it was supported by the practice of the most enlightened, perhaps it might be said, of all commercial nations; and it afforded the Court full confidence in their judgment in this case, that they found, upon recurring to the records of the Court of Appeals in Prize Causes, established during the war of the Revolution, that, in various cases, it was reasoned upon as the established law of that Court. Certain it was, that it was the law of England before the American Revolution, and therefore formed a part of the admiralty and maritime jurisdiction conferred upon the United States Courts by their Federal Constitution. Whether the trading, in that case, was such as, in the eye of the prize law, subjects the property to capture and confiscation, depended on the legal force of the term. If by *trading*, in the law of prize, were meant that signification of the term which consists in negotiation or contract, the case would certainly not come under the penalty of the rule. But the object, policy, and spirit of the rule are intended to cut off all communication, or actual locomotive intercourse between individuals of the States at war. Negotiation or contract had, therefore, no necessary connection with the offence. Intercourse, inconsistent with actual hostility, is the offence against which the rule is directed; and by substituting this term for that of *trading with the enemy*, an answer was given to the argument, that this was not a trading within the meaning of the cases cited. Whether,

on the breaking out of war, a citizen has a right to remove to his own country, with his property, or not, the claimant certainly had not a right to leave his own country for the purpose of bringing home his property from an enemy's country. As to the claim for the vessel, it was held to be founded upon no pretext whatever; for the undertaking was altogether voluntary and inexcusable.[1]

So where hostilities had broken out, and the vessel in question, with a full knowledge of the war, and unpressed by any peculiar danger, changed her course and sought an enemy's port, where she traded and took in a cargo, it was determined to be a cause of confiscation. If such an act could be justified, it would be in vain to prohibit trade with an enemy. The subsequent traffic in the enemy's country, by which her return cargo was obtained, connected itself with a voluntary sailing for a hostile port; nor did the circumstance that she was carried by force into one part of the enemy's dominions, when her actual destination was another, break the chain. The conduct of this ship was much less to be defended than that of The Rapid.[2]

So, also, where goods were purchased some time before the war, by the agent of an American citizen in Great Britain, but not shipped until nearly a year after the declaration of hostilities, they were pronounced liable to confiscation. Supposing a citizen had a right, on the breaking out of hostilities, to withdraw from the enemy's country his property, purchased before the war, (on which the Court gave no opinion,) such right must be exercised with due diligence, and within a reasonable time after a knowledge of hostilities. To admit a citizen to withdraw property from a hostile country a long time after the commencement of war, upon the pretext of its having been purchased before the war, would lead to the most injurious consequences, and hold out temptations to every species of fraudulent and illegal traffic with the enemy. To such an unlimited extent the right could not exist.[3]

In another case, the vessel, owned by citizens of the United States, sailed from thence before the war, with a cargo or freight,

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[1] Cranch's Rep. vol. viii. p. 155. The Rapid.

[2] Ibid. pp. 169–179. The Alexander.

[3] Ibid. p. 434. The St. Lawrence; vol. ix. p. 120, S. C.

on a voyage to Liverpool and the north of Europe, and thence back to the United States. She arrived in Liverpool, there discharged her cargo, and took in another at Hull, and sailed for Petersburg under a British license, granted the 8th June, 1812, authorizing the export of mahogany to Russia, and the importation of a return cargo to England. On her arrival at St. Petersburg she received news of the war, and sailed to London with a Russian cargo, consigned to British merchants; wintered in Sweden, and, in the spring of 1813, sailed under convoy of a British man-of-war for England, where she arrived and delivered her cargo, and sailed for the United States in ballast, under a British license, and was captured near Boston light-house. The Court stated, in delivering its judgment, that, after the decisions above cited, it was not to be contended that the sailing with a cargo or freight, from Russia to the enemy's country, after a full knowledge of the war, did not amount to such a trading with the enemy as to subject both vessel and cargo to condemnation, as prize of war, had they been captured whilst proceeding on that voyage. The alleged necessity of undertaking that voyage to enable the master, out of the freight, to discharge his expenses at St. Petersburg, countenanced, as the master declared, by the opinion of the United States minister there that, by undertaking such a voyage, he would violate no law of his own country; although those considerations, if founded in truth, presented a case of peculiar hardship, yet they afforded no legal excuse which it was competent for the Court to admit as the basis of its decision. The counsel for the claimant seemed to be aware of the insufficiency of this ground, and had applied their strength to show that the vessel was not taken *in delicto*, having finished the offensive voyage in which she was engaged in the enemy's country, and having been captured on her return home in ballast. It was not denied that, if she had been taken in the same voyage in which the offence was committed, she would be considered as still *in delicto*, and subject to confiscation; but it was contended that her voyage terminated at the enemy's port, and that she was on her return, on a new voyage. But the Court said, that even admitting that the outward and homeward voyage could be separated, so as to render them two distinct voyages, still, it could not be denied that the *termini* of the homeward voyage were St. Petersburg and the

United States. The continuity of such a voyage could not be broken by a voluntary deviation of the master, for the purpose of carrying on an intermediate trade. That the going from the neutral to the enemy's country was not undertaken as a new voyage, was admitted by the claimants, who alleged that it was undertaken as subsidiary to the voyage home. It was, in short, a voyage from the neutral country, by the way of the enemy's country; and, consequently, the vessel, during any part of that voyage, if seized for any conduct subjecting her to confiscation as prize of war, was seized *in delicto*.[1]

We have seen what is the rule of public and municipal law on this subject, and what are the sanctions by which it is guarded. Various attempts have been made to evade its operation, and to escape its penalties; but its inflexible rigor has defeated all these attempts. The apparent exceptions to the rule, far from weakening its force, confirm and strengthen it. They all resolve themselves into cases where the trading was with a neutral, or the circumstances were considered as implying a license, or the trading was not consummated until the enemy had ceased to be such. In all other cases, an express license from the government is held to be necessary, to legalize commercial intercourse with the enemy.[2] (*a*)

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[1] Cranch's Rep. vol. viii. pp. 451, 455. The Joseph.

[2] Robinson's Adm. Rep. vol. vi. p. 127. The Franklin; vol. iv. p. 195. The Madonna della Gracie; vol. v. p. 141. The Juffrow Catharina; p. 251. The Alby. Wheaton's Rep. vol. ii. Appendix, Note I. p. 34. Wheaton on Captures, pp. 220–223.

(*a*) [On the subject of commercial intercourse with the enemy, by the subjects of the belligerents themselves, important modifications have been introduced into the English maritime system, since the commencement of hostilities with Russia. To an inquiry made, on 20th of March, 1854, by the merchants connected with the Russian trade, whether produce of that country, brought over the frontier by land and shipped from thence by British or neutral vessels, would be subject to seizure by her Majesty's cruisers, and to subsequent confiscation in the High Court of Admiralty, the following answer, which is in accordance with the decisions rendered during former wars, was returned on the 25th of the same month, by direction of the Secretary of State for Foreign Affairs: —

"Lord Clarendon conceives that the question will turn upon the true ownership, or the interest, or risk in, and the destination of, the property, which may be seized or captured; and that neither the place of its origin, nor the manner

§ 14. Trade with the common

Not only is such intercourse with the enemy, on the part of the subjects of the belligerent State, prohibited

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of its conveyance to the port from whence it was shipped, will be decisive, or even, in most cases, of any real importance.

"Such property, if shipped at neutral risk, or after it has become *bonâ fide* neutral property, will not be liable to condemnation, whatever may be its destination. If it should still remain enemy's property, notwithstanding it is shipped from a neutral port and in a neutral ship, it will be condemned, whatever may be its destination. If it be British property, or shipped at British risk, it will be condemned if it is proved to be really engaged in a trade with the enemy, but not otherwise. The place of its origin will be immaterial; and if there has been a *bonâ fide* and complete transfer of ownership to a neutral, (as by purchase in the neutral market,) the goods will not be liable to condemnation, notwithstanding they may have come to that neutral market from the enemy's country, either overland or by sea. Lord Clarendon has, however, to observe, that circumstances of reasonable suspicion will justify capture, although release, and not condemnation, may follow; and that ships with cargoes of Russian produce may not improbably be considered, under certain circumstances, as liable to capture, even though not liable to condemnation." London Times, March, 1854.

England having, however, in conjunction with France, by the royal declaration of the 28th of March, adopted not only the principle, "free ships free goods," but adhered to her former rule, not to claim the confiscation of neutral goods in enemy's vessels, neither of which relaxations would have given immunity to the property of the allies themselves, engaged in a trade with the enemy, an Order in Council, of the 15th of April, authorized not only a neutral trade in neutral ships with the enemy's ports, but it allowed it to be carried on by British subjects, provided neutral vessels were employed; the only restrictions on such trade being that it should not extend to contraband, and articles requiring a special permission to export them, or to a violation of blockade. But the prohibition, as regards British vessels, to enter or communicate with any port or place in possession of the enemy, and which, apart from any special provision, is the ordinary consequence of the war, is still retained, in express terms. "All goods and merchandises whatsoever, to whomsoever the same may belong," and which are words including even Russian property, may be shipped under any flag but the Russian; and it is open to all traders to take such cargoes on board in any port not being blockaded. The same order declares, "that all the subjects of her Majesty, and the subjects and citizens of any neutral or friendly State, shall and may, during and notwithstanding the present hostilities with Russia, freely trade with all ports and places, wheresoever situate, which shall not be in a state of blockade; save and except that no British vessel shall, under any circumstances whatsoever, either under or by virtue of this order, or otherwise, be permitted or empowered to communicate with any port or place, which shall belong to or be in the possession or occupation of her Majesty's enemies." London Gazette, April 18, 1854.

"The effect of this order is, therefore," says a late English writer, "to leave

and punished with confiscation in the Prize Courts of their own country, but, during a conjoint war, no subject of an ally can trade with the common enemy, without being liable to the forfeiture, in the Prize Courts of the ally, of his property engaged in such trade. This rule is a corollary of the other; and is founded upon the principle, that such trade is forbidden to the subjects of the co-belligerent by the municipal law of his own country, by the universal law of nations, and by the express or implied terms of the treaty of alliance subsisting between the allied powers. And as the former rule can be relaxed only by the permission of the sovereign power of the State, so this can be relaxed only by the permission of the allied nations, according to their mutual agreement. A declaration of hostilities naturally carries with it an interdiction of all commercial intercourse. Where one State only is at war, this interdiction may be relaxed, as to its own subjects, without injuring any other State; but when allied nations are pursuing a common cause against a common enemy, there is an implied, if not an express contract, that neither of the co-belligerent States shall do any thing to defeat the common object. If one State allows its subjects to carry on an uninterrupted trade with the enemy, the consequence will be, that it will supply aid and comfort to the enemy, which may be injurious to the common cause. It should seem that it is not enough, therefore, to satisfy the Prize Court of one of the allied States, to say that the other has allowed this practice to its own subjects; it should also be shown, either that the practice is of such a nature as cannot interfere with the com-

enemy, unlawful on the part of allied subjects.

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the trade of this country with neutrals, and even the indirect trade with Russia, in the same state it was during peace, as far as the law of our courts maritime is concerned, and the doctrine of illegal trading with the enemy is at an end. The restrictions henceforth to be imposed are solely those arising out of direct naval and military operations; such as blockade, and those which the enemy may think fit to lay upon British and French property. As far as we are concerned, except that British ships are not to enter Russian ports, which it is obvious that they could not do without incurring the risk of a forfeiture of their property and the imprisonment of their crews, and which may otherwise be objectionable, on certain grounds of policy into which it is not necessary to enter in this place, the trade may be lawfully carried on in any manner which the ingenuity and enterprise of our merchants may devise." Loch's Practical Legal Guide. Edinburgh Rev. July, 1854, p. 113, Am. ed.]

mon operations, or that it has the allowance of the other confederate State.[1]

§ 15. Contracts with the enemy prohibited.

It follows as a corollary from the principle, interdicting all commercial and other pacific intercourse with the public enemy, that every species of private contract made with his subjects during the war is unlawful. The rule thus deduced is applicable to insurance on enemy's property and trade; to the drawing and negotiating of bills of exchange between subjects of the powers at war; to the remission of funds, in money or bills, to the enemy's country; to commercial partnerships entered into between the subjects of the two countries, after the declaration of war, or existing previous to the declaration; which last are dissolved by the mere force and act of the war itself, although, as to other contracts, it only suspends the remedy.[2]

§ 16. Persons domiciled in the enemy's country liable to reprisals.

Grotius, in the second chapter of his third book, where he is treating of the liability of the property of subjects for the injuries committed by the State to other communities, lays down that "by the law of nations, all the subjects of the offending State, who are such from a permanent cause, whether natives, or emigrants from another country, are liable to reprisals, but not so those who are only travelling or sojourning for a little time; — for reprisals," says he, "have been introduced as a species of charge imposed in order to pay the debts of the public; from which are exempt those who are only temporarily subject to the laws. Ambassadors and their goods are, however, excepted from this liability of subjects, but not those sent to an enemy." In the fourth chapter of the same book, where he is treating of the right of killing and doing other bodily harm to enemies, in what he calls *solemn war*, he holds that this right extends, "not only to those who bear arms, or are subjects of the author of the war, but to

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[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 10. Robinson's Adm. Rep. vol. iv. p. 251; vol. vi. p. 403. The Neptunus.

[2] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 21. Duponceau's Transl. p. 165, Note. Kent's Commentaries on American Law, vol. i. pp. 67, 68, 5th edit.

all those who are found within the enemy's territory. In fact, as we have reason to fear the hostile intentions even of strangers who are within the enemy's territory at the time, that is sufficient to render the right of which we are speaking applicable even to them in a general war. In which respect there is a distinction between war and reprisals, which last, as we have seen, are a kind of contribution paid by the subjects for the debts of the State." [1]

Barbeyrac, in a note collating these passages, observes, that "the late M. Cocceius, in a dissertation which I have already cited, De Jure Belli in Amicos, rejects this distinction, and insists that even those foreigners who have not been allowed time to retire ought to be considered as adhering to the enemy, and for that reason justly exposed to acts of hostility. In order to supply this pretended defect, he afterwards distinguishes foreigners who remain in the country, from those who only transiently pass through it, and are constrained by sickness or the necessity of their affairs. But this is alone sufficient to show that, in this

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[1] "Cæterùm non minus in hâc materiâ quàm in aliis cavendum est, ne confundamus ea quæ juris gentium sunt proprie, et ea quæ jure civili aut pactis populorum constituuntur.

"Jure gentium subjacent pignorationi omnes subditi injuriam facientes, qui tales sunt ex causâ permanente, sive indigenæ, sive advenæ, non qui transeundi aut moræ exignæ causâ alicubi sunt. Introductæ enim sunt pignorationes ad exemplum onerum, quæ pro exsolvendis debitis publicis inducuntur, quorum immunes sunt qui tantùm pro tempore loci legibus subsunt. A numero tamen subditorum jure gentium excipiuntur legati, non ad hostes nostros missi, et res eorum." Grotius, de Jur. Bel. ac Pac. lib. iii. cap. ii. § 7, No. 1.

"Latè autem patet hoc jus licentiæ, nam primùm non eos tantum comprehendit qui actu ipso arma gerunt, aut qui bellum moventis subditi sunt, sed omnes etiam qui intra fines sunt hostiles: quod apertum fit ex ipsâ formulâ apud Livium, *Hostis sit ille, quique intra præsidia ejus sunt;* nimirùm quia ab illis quoque damnum metui potest, quod in bello continuo et universali sufficit ut locum habeat jus de quo agimus: aliter quàm in pignorationibus, quæ, ut diximus, ad exemplum onerum impositorum ad luenda civitatis debita, introductæ sunt: quare mirum non est, si, quod Baldus notat, multò plus licentiæ sit in bello quàm in pignorandi jure. Et hoc quidem quod dixi in peregrinis, qui commisso cognitoque bello intra fines hosticos veniunt, dubitationem non habet.

"At qui ante bellum eo iverant, videntur jure gentium pro hostibus haberi, post modicum tempus intra quod discedere potuerant." Ib. lib. iii. cap. iv. §§ 6–7.

place, as in many others, he criticized our author without understanding him. In the following paragraph, Grotius manifestly distinguishes from the foreigners of whom he has just spoken those who are permanent subjects of the enemy, by whom he doubtless understands, as the learned Gronovius has already explained, those who are *domiciled* in the country. Our author explains his own meaning in the second chapter of this book, in speaking of reprisals, which he allows against this species of foreigners, whilst he does not grant them against those who only pass through the country, or are temporarily resident in it."[1]

Whatever may be the extent of the claims of a man's native country upon his political allegiance, there can be no doubt that the natural-born subject of one country may become the citizen of another, in time of peace, for the purposes of trade, and may become entitled to all the commercial privileges attached to his required domicile. On the other hand, if war breaks out between his adopted country and his native country, or any other, his property becomes liable to reprisals in the same manner as the effects of those who owe a permanent allegiance to the enemy State.

§ 17. Species of residence constituting domicile.

As to what species of residence constitutes such a domicile as will render the party liable to reprisals, the text writers are deficient in definitions and details. Their defects are supplied by the precedents furnished by the British prize courts, which, if they have not applied the principle with undue severity in the case of neutrals, have certainly not mitigated it in its application to that of British subjects resident in the enemy's country on the commencement of hostilities.

In the judgment of the Lords of Appeal in Prize Causes, upon the cases arising out of the capture of St. Eustatius by Admiral Rodney, delivered in 1785, by Lord Camden, he stated that "if a man went into a foreign country upon a visit, to travel for health, to settle a particular business, or the like, he thought it would be hard to seize upon his goods; but a residence, not

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[1] Grotius, par Barbeyrac, *in loc.* [See on this point Wheaton on Captures, p. 102, and the cases there cited.]

attended with these circumstances, ought to be considered as a permanent residence." In applying the evidence and the law to the resident foreigners in St. Eustatius, he said, that "in every point of view, they ought to be considered resident subjects. Their persons, their lives, their industry, were employed for the benefit of the State under whose protection they lived; and if war broke out, they continuing to reside there, paid their proportion of taxes, imposts, and the like, equally with natural-born subjects, and no doubt come within that description."[1]

"Time," says Sir W. Scott, "is the grand ingredient in constituting domicile. In most cases, it is unavoidably conclusive. It is not unfrequently said, that if a person comes only for a special purpose, *that* shall not fix a domicile. This is not to be taken in an unqualified latitude, and without some respect to the time which such a purpose may or shall occupy; for if the purpose be of such a nature as *may probably*, or *does actually*, detain the person for a great length of time, a general residence might grow upon the special purpose. A special purpose may lead a man to a country, where it shall detain him the whole of his life. Against such a long residence, the plea of an original special purpose could not be averred; it must be inferred in such a case, that other purposes forced themselves upon him, and mixed themselves with the original design, and impressed upon him the character of the country where he resided. Supposing a man comes into a belligerent country at or before the beginning of the war, it is certainly reasonable not to bind him too soon to an acquired character, and to allow him a fair time to disentangle himself; but if he continues to reside during a good part of the war, contributing by the payment of taxes and other means to the strength of that country, he could not plead his special purpose with any effect against the rights of hostility. If he could, there would be no sufficient guard against the frauds and abuses of masked, pretended, original, and sole purposes of a long-continued residence. There is a time which will estop such a plea; no rule can fix the

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[1] MS. Proceedings of the Commissioners under the Treaty of 1794, between Great Britain and the United States. Opinion of Mr. W. Pinkney, in the case of The Betsey.

time *à priori*, but such a rule there *must* be. In proof of the efficacy of mere time, it is not impertinent to remark that the same quantity of business, which would not fix a domicile in a certain quantity of time, would nevertheless have that effect if distributed over a larger space of time. This matter is to be taken in the compound ratio of the time and the occupation, with a great preponderance on the article of time: be the occupation what it may, it cannot happen, with but few exceptions, that mere length of time shall not constitute a domicile."[1]

In the case of The Indian Chief, determined in 1800, Mr. Johnson, a citizen of the United States, domiciled in England, had engaged in a mercantile enterprise to the British East Indies, a trade prohibited to British subjects, but allowed to American citizens under the commercial treaty of 1794, between the United States and Great Britain. The vessel came into a British port on its return voyage, and was seized as engaged in illicit trade. Mr. Johnson, having then left England, was determined not to be a British subject at the time of capture, and restitution was decreed. In delivering his judgment in this case, Sir W. Scott said, "Taking it to be clear that the national character of Mr. Johnson, as a British merchant, was founded in residence only, that it was acquired by residence, and rested on that circumstance alone, it must be held, that, from the moment he turned his back on the country where he had resided, on his way to his own country, he was in the act of resuming his original character, and must be considered as an American. The character that is gained by residence, ceases by non-residence. It is an adventitious character, and no longer adheres to him from the moment that he puts himself in motion, *bonâ fide*, to quit the country, *sine animo revertendi*."[2]

The native character easily reverts.

The native character easily reverts, and it requires fewer circumstances to constitute domicile, in the case of a native subject, than to impress the national character on one who is originally of another country. Thus, the property of a Frenchman who had been residing, and was pro-

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[1] Robinson's Adm. Rep. vol. ii. p. 324. The Harmony.

[2] Robinson's Adm. Rep. vol. iii. p. 12. The Indian Chief. [See also Hagg. Adm. Rep. vol. i. p. 103. The Matchless.]

bably naturalized, in the United States, but who had returned to St. Domingo, and shipped from thence the produce of that island to France, was condemned in the High Court of Admiralty.[1]

In The Indian Chief, the case of Mr. Dutilth is referred to by the claimant's counsel, as having obtained restitution, though *at the time of sailing* he was resident in the enemy's country; but the decision of the Lords of Appeal, in 1800, is mentioned by Sir C. Robinson, in which different portions of Mr. Dutilth's property were condemned or restored, according to the circumstances of his residence at the time of capture. That decision is more particularly stated by Sir J. Nicholl, at the hearing of the case of The Harmony before the Lords, July 7, 1803. "The case of Mr. Dutilth also illustrates the present. He came to Europe about the end of July, 1793, at the time when there was a great deal of alarm on account of the state of commerce. He went to Holland, then not only in a state of amity, but of alliance with this country; he continued there until the French entered. During the whole time he was there, he was without any establishment; he had no counting-house; he had no contracts nor dealings with contractors there; he employed merchants there to sell his property, paying them a commission. Upon the French entering into Holland, he applied for advice to know what was left for him to do under the circumstances, having remained there on account of the doubtful state of mercantile credit, which not only affected Dutch and American, but English houses, who were all looking after the state of credit in that country. In 1794, when the French came there, Mr. D. applied to Mr. Adams, the American minister, who advised him to stay until he could get a passport. He continued there until the latter end of that year, and having wound up his concerns, came away. Some part of his property was captured before he came there. That part which was taken before he came there was restored to him, (The Fair American, Adm., 1796,) but that part which was taken while he

[1] Robinson's Adm. Rep. vol. v. p. 99. La Virginie. The same rule is also adopted in the prize law of France, Code des Prises, tom. i. pp. 92, 139, 303, and by the American prize courts, Wheaton's Rep. vol. ii. p. 76. The Dos Hermanos.

was there was condemned, and *that* because he was in Holland at the time of the capture." The Hannibal and Pomona, Lords, 1800.[1]

The case of The Diana, determined by Sir W. Scott, in 1803, is also full of instruction on this subject. During the war which commenced in 1795 between Great Britain and Holland, the colony of Demerara surrendered to the British arms, and by the treaty of Amiens it was restored to the Dutch. That treaty contained an article allowing the inhabitants, of whatever country they might be, a term of three years, to be computed from the notification of the treaty, for the purpose of disposing of their effects acquired before or during the war, in which term they might have the free enjoyment of their property. Previous to the declaration of war against Holland, in 1803, The Diana and several other vessels, laden with colonial produce, were captured on a voyage from Demerara to Holland. Immediately after the declaration, and before the expiration of the three years from the notification of the treaty of Amiens, Demerara again surrendered to Great Britain. Claims to the captured property were filed by original British subjects, inhabitants of Demerara, some of whom had settled in the colony while it was in possession of Great Britain; others before that event. The cause came on for hearing after it had again become a British colony.

Sir W. Scott decreed restitution to those British subjects who had settled in the colony while in British possession, but condemned the property of those who had settled there before that time. He held that those of the first class, by settling in Demerara while belonging to Great Britain, afforded a presumption of their intending to return, if the island should be transferred to a foreign power, which presumption, recognized by the treaty, relieved those claimants from the necessity of proving such intention. He thought it reasonable that they should be admitted to their *jus postliminii*, and he held them entitled to the protection of British subjects. But he was clearly of opinion that "mere recency of establishment would not avail, if the intention of making a permanent residence there was fixed upon the party.

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[1] Wheaton's Rep. vol. ii. Appendix, 27, 28, 29.

The case of Mr. Whitehill fully established this point. He had arrived at St. Eustatius only a day or two before Admiral Rodney and the British forces made their appearance; but it was proved that he had gone to establish himself there, and his property was condemned. Here recency, therefore, would not be sufficient."

But the property of those claimants who had settled in Demerara before that colony came into the possession of Great Britain, was condemned. "Having settled without any faith in British possession, it cannot be supposed," he said, "that they would have relinquished their residence because that possession had ceased. They had passed from one sovereignty with indifference; and if they may be supposed to have looked again to a connection with this country, they must have viewed it as a circumstance that was in no degree likely to affect their intention of remaining there. On the situation of persons settled there previous to the time of British possession, I feel myself obliged to pronounce, that they must be considered in the same light as persons resident in Amsterdam. It must be understood, however, that if there were among these any who were actually removing, and that fact is properly ascertained, their goods may be capable of restitution. All that I mean to express is, that there must be evidence of an intention to remove on the part of those who settled prior to British possession, the presumption not being in their favor." [1]

Case of persons removing from the enemy's country on the breaking out of war.

The case of The Ocean, determined in 1804, was a claim relating to British subjects settled in foreign States in time of amity, and taking early measures to withdraw themselves on the breaking out of war. It appeared that the claimant had been settled as a partner in a house of trade in Holland, but that he had made arrangements for the dissolution of the partnership, and was prevented from removing personally only by the violent detention of all British subjects who happened to be within the territories of the enemy at the breaking out of the war. In this case Sir W. Scott said: "It would, I think, be going further than the law requires, to conclude this person by his former occupation, and

[1] Robinson's Adm. Rep. vol. v. p. 60. The Diana.

by his present constrained residence in France, so as not to admit him to have taken himself out of the effect of supervening hostilities, by the means which he had used for his removal. On sufficient proof being made of the property, I shall be disposed to hold him entitled to restitution." [1]

In a note to this case, Sir C. Robinson states that the situation of British subjects, wishing to remove from the enemy's country on the event of a war, but prevented by the sudden occurrence of hostilities from taking measures sufficiently early to obtain restitution, formed not unfrequently a case of considerable hardship in the Prize Court. He advises persons so situated, on their actual removal, to make application to government for a special pass, rather than to trust valuable property to the effect of a mere intention to remove, dubious as that intention may frequently appear under the circumstances that prevent it from being carried into execution. And Sir W. Scott, in the case of The Dree Gebroeders, observes, "that pretences of withdrawing funds are, at all times, to be watched with considerable jealousy; but when the transaction appears to have been conducted *bonâ fide* with that view, and to be directed only to the removal of property, which the accidents of war may have lodged in the belligerent country, cases of this kind are entitled to be treated with some indulgence." But in a subsequent case, where an indulgence was allowed by the court for the withdrawal of British property under peculiar circumstances, he intimated that the decree of restitution, in that particular case, was not to be understood as in any degree relaxing the necessity of obtaining a license, wherever property is to be withdrawn from the enemy's country.[2]

Decisions of the American courts.

The same principles, as to the effect of domicile, or commercial inhabitancy in the enemy's country, were adopted by the prize tribunals of the United States, during the late war with Great Britain. The rule was applied to the case of native British subjects, who had emigrated to the United States long before the war, and became naturalized citi-

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[1] Robinson's Adm. Rep. vol. v. p. 91.

[2] Robinson's Adm. Rep. vol. iv. p. 234; vol. v. p. 141. The Juffrow Catharina.

zens under the laws of the Union, as well as to native citizens residing in Great Britain at the time of the declaration. The naturalized citizens in question had, long prior to the declaration of war, returned to their native country, where they were domiciled and engaged in trade at the time the shipments in question were made. The goods were shipped before they had a knowledge of the war. At the time of the capture, one of the claimants was yet in the enemy's country, but had, since he heard of the capture, expressed his anxiety to return to the United States, but had been prevented by various causes set forth in his affidavit. Another had actually returned some time after the capture, and a third was still in the enemy's country.

In pronouncing its judgment in this case, the Supreme Court stated that, there being no dispute as to the facts upon which the domicile of the claimants was asserted, the questions of law to be considered were two: *First*, by what means, and to what extent, a national character may be impressed upon a person, different from that which permanent allegiance gives him? and, *secondly*, what are the legal consequences to which this acquired character may expose him, in the event of a war taking place between the country of his residence and that of his birth, or that in which he had been naturalized?

Upon the first of these questions, the opinions of the text writers and the decisions of the British Courts of Prize already cited, were referred to; but it was added that, in deciding whether a person has obtained the right of an acquired domicile, it was not to be expected that much, if any assistance, should be derived from mere elementary writers on the law of nations. They can only lay down the general principles of law; and it becomes the duty of courts of justice to establish rules for the proper application of those principles. The question, whether the person to be affected by the right of domicile has sufficiently made known his intention of fixing himself permanently in the foreign country, must depend upon all the circumstances of the case. If he has made no express declaration on the subject, and his secret intention is to be discovered, his *acts* must be attended to as affording the most satisfactory evidence of his intention. On this ground the courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes by these acts such evidences of

an intention permanently to reside there, as to stamp him with the national character of the State where he resides. In questions on this subject, the chief point to be considered is the *animus manendi;* and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appears that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicile is acquired by residence even of a few days. This was one of the rules of the British Prize Courts, and it appeared to be perfectly reasonable. Another was that a neutral or subject, found residing in a foreign country, is presumed to be there *animo manendi;* and if a state of war should bring his national character into question, it lies upon him to explain the circumstances of his residence. As to some other rules of the Prize Courts of England, particularly those which fix the national character of a person, on the ground of constructive residence or the peculiar nature of his trade, the court was not called upon to give an opinion at that time; because, in the present case, it was admitted that the claimants had acquired a right of domicile in Great Britain at the time of the breaking out of the war between that country and the United States.

The next question was, what are the consequences to which this acquired domicile may legally expose the person entitled to it, in the event of a war taking place between the government under which he resides and that to which he owes permanent allegiance. A neutral, in this situation, if he should engage in open hostilities with the other belligerent, would be considered and treated as an enemy. A citizen of the other belligerent could not be so considered, because he could not, by any act of hostility, render himself, strictly speaking, an enemy, contrary to his permanent allegiance; but although he cannot be considered an enemy, in the strict sense of the word, yet he is deemed such with reference to the seizure of so much of his property concerned in the enemy's trade as is connected with his residence. It is found adhering to the enemy; he is himself adhering to the enemy, although not criminally so, unless he engages in acts of hostility against his native country, or perhaps refuses, when required by his country, to return. The same rule, as to property engaged in the commerce of the enemy, applies to neutrals, and for the same reason. The converse of this rule inevitably applies

to the subject of a belligerent State domiciled in a neutral country; he is deemed a neutral by both belligerents, with reference to the trade which he carries on with the adverse belligerent, and with the rest of the world.

But this national character which a man acquires by residence may be thrown off at pleasure, by a return to his native country, or even by turning his back on the country in which he resided, on his way to another. The reasonableness of this rule can hardly be disputed. Having once acquired a national character, by residence in a foreign country, he ought to be bound by all the consequences of it until he has thrown it off, either by an actual return to his native country, or to that where he was naturalized, or by commencing his removal, *bonâ fide*, and without an intention of returning. If any thing short of actual removal be admitted to work a change in the national character acquired by residence, it seems perfectly reasonable that the evidence of a *bonâ fide* intention should be such as to leave no doubt of its sincerity. Mere declarations of such an intention ought never to be relied upon, when contradicted, or at least rendered doubtful, by a continuance of that residence which impressed the character. They may have been made to deceive; or, if sincerely made, they may never be executed. Even the party himself ought not to be bound by them, because he may afterwards find reason to change his determination, and ought to be permitted to do so. But when he accompanies these declarations by acts which speak a language not to be mistaken, and can hardly fail to be consummated by actual removal, the strongest evidence is afforded which the nature of such a case can furnish. And is it not proper that the courts of a belligerent nation should deny to any person the right to use a character so equivocal, as to put in his power to claim whichever may best suit his purpose, when it is called in question? If his property be taken trading with the enemy, shall he be allowed to shield it from confiscation, by alleging that he had intended to remove from the enemy's country to his own, then neutral, and therefore that, as a neutral, the trade was to him lawful? If war exists between the country of his residence and his native country, and his property be seized by the former or by the latter, shall he be heard to say, in the former case, that he was a domiciled subject in the country of the captor; and in the latter that he was a

native subject of the country of that captor also, because he had declared an intention to resume his native character, and thus to parry the belligerent rights of both? It was to guard against such inconsistencies, and against the frauds which such pretensions, if tolerated, would sanction, that the rule above mentioned had been adopted. Upon what sound principle could a distinction be framed between the case of a neutral, and the subject of one belligerent domiciled in the country of the other, at the breaking out of the war? The property of each, found engaged in the commerce of their adopted country, belonged to them, before the war, in their character of subjects of that country, so long as they continued to retain their domicile; and when war takes place between that country and any other, by which the two nations and all their subjects become enemies to each other, it follows that this property, which was once the property of a friend, belongs now to him who, in reference to that property, is an enemy.

This doctrine of the common-law courts and prize tribunals of England is founded, like that mentioned under the first head upon international law, and was believed to be strongly supported by reason and justice. And why, it might be confidently asked, should not the property of enemy's subjects be exposed to the law of reprisals and of war, so long as the owner retains his acquired domicile, or, in the words of Grotius, continues a permanent residence in the country of the enemy? They were before, and continue after the war, bound by such residence to the society of which they were members, subject to the laws of the State, and owing a qualified allegiance thereto. They are obliged to defend it, (with an exception of such subject with relation to his native country,) in return for the protection it affords them, and the privileges which the laws bestow upon them, as subjects. The property of such persons, equally with that of the native subjects in their locality, is to be considered as the goods of the nation, *in regard to other States.* It belongs in some sort to the State, from the right which the State has over the goods of its citizens, which make a part of the sum total of its riches, and augment its power. Vattel, liv. i. ch. 14, § 182. "In reprisals," continues the same author, "we seize on the property of the subject, just as on that of the sovereign; every thing that belongs to the nation is subject to reprisals, wherever it can

be seized, with the exception of a deposit intrusted to the public faith." Liv. ii. ch. 18, § 344. Now if a permanent residence constitutes the person a subject of the country where he is settled, so long as he continues to reside there, and subjects his property to the law of reprisals, as a part of the property of the nation, it would seem difficult to maintain that the same consequences would not follow, in the case of an open and public war, whether between the adopted and native countries of persons so domiciled, or between the former and any other nation.

If, then, nothing but an actual removal, or a *bonâ fide* beginning to remove, could change a national character acquired by domicile; and if, at the time of the inception of the voyage, as well as at the time of capture, the property belonged to such domiciled person, in his character of a subject; what was there that did or ought to exempt it from capture by the cruisers of his native country, if, at the time of capture, he continues to reside in the country of the adverse belligerent?

It was contended that a native or naturalized subject of one country, who is surprised in the country where he was domiciled, by a declaration of war, ought to have time to make his election to continue there, or to remove to the country to which he owes permanent allegiance; and that, until such election be made, his property ought to be protected from capture by the cruisers of the latter. This doctrine was believed to be as unfounded in reason and justice, as it clearly was in law. In the first place, it was founded upon a presumption that the person will certainly remove, before it can possibly be known whether he may elect to do so or not. It was said, that the presumption ought to be made, because, upon receiving information of the war, it would be his duty to return home. This position was denied. It was his duty to commit no acts of hostility against his native country, and to return to her assistance when required to do so; nor would any just nation, regarding the mild principles of the law of nations, require him to take arms against his native country, or refuse permission to him to withdraw whenever he wished to do so, unless under peculiar circumstances, which, by such removal, at a critical period, might endanger the public safety. The conventional law of nations was in conformity with these principles. It is not uncommon to stipulate in treaties, that the

subjects of each party shall be allowed to remove with their property, or to remain unmolested. Such a stipulation does not coerce those subjects to remove or remain. They are left free to choose for themselves; and, when they have made their election, may claim the right of enjoying it, under the treaty. But until the election is made, their former character continues unchanged. Until this election is made, if the claimant's property found upon the high seas, engaged in the commerce of his adopted country, should be permitted by the cruisers of the other belligerent to pass free, under a notion that he may elect to remove upon notice of the war, and should arrive safe; what is to be done, in case the owner of it should elect to remain where he is? For if captured, and brought immediately to adjudication, it must, upon this doctrine, be acquitted, until the election to remain is made and known. In short, the point contended for would apply the doctrine of relation to cases where the party claiming the benefit of it may gain all and can lose nothing. If he, after the capture, should find it for his interest to remain where he is domiciled, his property, embarked before his election was made, is safe; and if he finds it best to return, it is safe, of course. It is safe, whether he goes or stays. This doctrine producing such contradictory consequences was not only unsupported by any authority, but would violate principles long and well established in the Prize Courts of England, and which ought not, without strong reasons which may render them inapplicable to America, to be disregarded by the Court. The rule there was, that the character of property during war cannot be changed *in transitu*, by any act of the party, subsequent to the capture. The rule indeed went further; as to the correctness of which, in its greatest extension, no judgment needed then to be given; but it might safely be affirmed, that the change could not and ought not to be effected by an election of the owner and shipper, made subsequent to the capture, and more especially after a knowledge of the capture is obtained by the owner. Observe the consequences. The capture is made and known. The owner is allowed to deliberate whether it is his intention to remain a subject of his adopted or of his native country. If the capture be made by the former, then he elects to become a subject of that country; if by the latter, then a subject of that. Could such a privileged situation be tolerated by either belligerent? Could

any system of law be correct which places an individual, who adheres to one belligerent, and, down to the period of his election to remove, contributes to increase her wealth, in so anomalous a situation as to be clothed with the privileges of a neutral, as to both belligerents? This notion about a temporary state of neutrality, impressed upon a subject of one of the belligerents, and the consequent exemption of his property from capture by either, until he has had notice of the war and made his election, was altogether a novel theory, and seemed, from the course of the argument, to owe its origin to a supposed hardship, to which the contrary doctrine exposes him. But if the reasoning employed on the subject was correct, no such hardship could exist; for if, before the election is made, his property on the ocean is liable to capture by the cruisers of his native and deserted country, it is not only free from capture by those of his adopted country, but is under its protection. The privilege is supposed to be equal to the disadvantage, and is, therefore, just. The double privilege claimed seems too unreasonable to be granted.[1] (*a*)

§ 18. Merchants residing in the east.

The national character of merchants residing in Europe and America is derived from that of the country in which they reside. In the eastern parts of the world, European persons, trading under the shelter and protection of the factories founded there, take their national character from that association under which they live and carry on their trade: this distinction arises from the nature and habits of the countries. In the western part of the world, alien merchants mix in the society of the natives; access and intermixture are permitted, and they become incorporated to nearly the full ex-

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[1] Cranch's Rep. vol. viii. p. 277. The Venus. Wheaton's Rep. vol. i. p. 54. The Mary and Susan.

(*a*) [It was decided by the Supreme Court of the United States, in a case arising during the Mexican war, that a neutral leaving, with his family, at the commencement of the war, a belligerent country, in which he had been domiciled, might carry with him his property acquired there. His neutral character reverts, as to his person and property, as soon as he sails from the hostile port. The property he takes with him is not liable to condemnation, for a breach of blockade by the vessel in which he embarks, when entering or departing from the port, unless he knew of the intention of the vessel to break it in going out. Howard's Rep. vol. xi. p. 60. United States *v.* Guillem.]

tent. But in the east, from almost the oldest times, an immiscible character has been kept up; foreigners are not admitted into the general body and mass of the nation; they continue strangers and sojourners, as all their fathers were. Thus, with respect to establishments in Turkey, the British courts of prize, during war with Holland, determined that a merchant, carrying on trade at Smyrna, under the protection of the Dutch consul, was to be considered a Dutchman, and condemned his property as belonging to an enemy. And thus in China, and generally throughout the east, persons admitted into a factory are not known in their own peculiar national character: and not being permitted to assume the character of the country, are considered only in the character of that association or factory.

But these principles are considered not to be applicable to the vast territories occupied by the British in Hindostan; because, as Sir W. Scott observes, "though the sovereignty of the Mogul is occasionally brought forward for the purposes of policy, it hardly exists otherwise than as a phantom: it is not applied in any way for the regulation of their establishments. Great Britain exercises the power of declaring war and peace, which is among the strongest marks of actual sovereignty; and if the high and empyrean sovereignty of the Mogul is sometimes brought down from the clouds, as it were, for the purposes of policy, it by no means interferes with the actual authority which that country, and the East India Company, a creature of that country, exercise there with full effect. Merchants residing there are hence considered as British subjects."[1]

§ 19. House of trade in the enemy's country.

In general, the national character of a person, as neutral or enemy, is determined by that of his domicile; but the property of a person may acquire a hostile character, independently of his national character, derived from personal residence. Thus the property of a house of trade established in the enemy's country is considered liable to capture and condemnation as prize. This rule does not apply to cases arising at the commencement of a war, in reference to persons who,

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[1] Robinson's Adm. Rep. vol. iii. p. 12. The Indian Chief.

during peace, had habitually carried on trade in the enemy's country, though not resident there, and are therefore entitled to time to withdraw from that commerce. But if a person enters into a house of trade in the enemy's country, or continues that connection during the war, he cannot protect himself by mere residence in a neutral country.[1]

§ 20. Converse of the rule.

The converse of this rule of the British prize courts, which has also been adopted by those of America, is not extended to the case of a merchant residing in a hostile country, and having a share in a house of trade in a neutral country. Residence in a neutral country will not protect his share in a house established in the enemy's country, though residence in the enemy's country will condemn his share in a house established in a neutral country. It is impossible not to see, in this want of reciprocity, strong marks of the partiality towards the interests of captors, which is perhaps inseparable from a prize code framed by judicial legislation in a belligerent country, and adapted to encourage its naval exertions.[2]

§ 21. Produce of the enemy's territory considered as hostile, so long as it belongs to the owner of the soil, whatever may be his national character or personal domicile.

The produce of an enemy's colony, or other territory, is to be considered as hostile property so long as it belongs to the owner of the soil, whatever may be his national character in other respects, or wherever may be his place of residence.

This rule of the British prize courts was adopted by the Supreme Court of the United States, during the late war with Great Britain, in the following case. The island of Santa Cruz, belonging to the King of Denmark, was subdued during the late European war by the arms of his Britannic Majesty. Adrian Benjamin Bentzon, an officer of the Danish government, and a proprietor of land in the island, withdrew from the island on its surrender, and had

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[1] Robinson's Adm. Rep. vol. i. p. 1. The Vigilantia. Vol. ii. p. 255. The Susa. Vol. iii. p. 41. The Portland. Vol. v. p. 297. The Jonge Klassina. Wheaton's Rep. vol. i. p. 159. The Antonia Johanna. Vol. iv. p. 105. The Friendschaft.

[2] Mr. Chief Justice Marshall, Cranch's Rep. vol. viii. p. 253. The Venus.

since resided in Denmark. The property of the inhabitants being secured to them by the capitulation, he still retained his estate in the island under the management of an agent, who shipped thirty hogsheads of sugar, the produce of that estate, on board a British ship, and consigned to a commercial house in London, on account and risk of the owner. On her passage the vessel was captured by an American privateer, and brought in for adjudication. The sugars were condemned in the court below as prize of war, and the sentence of condemnation was affirmed on appeal by the Supreme Court.

In pronouncing its judgment, it was stated by the court, that some doubt had been suggested whether Santa Cruz, while in the possession of Great Britain, could properly be considered as a British island. But for this doubt there could be no foundation. Although acquisitions, made during war, are not considered as permanent, until confirmed by treaty, yet to every commercial and belligerent purpose they are considered as a part of the domain of the conqueror, so long as he retains the possession and government of them. The island of Santa Cruz, after its capitulation, remained a British island until it was restored to Denmark.

The question was, whether the produce of a plantation in that island, shipped by the proprietor himself, who was a Dane residing in Denmark, must be considered as British, and therefore enemy's property.

In arguing this question the counsel for the claimants had made two points. 1. That the case did not come within the rule applicable to shipments from an enemy's country, even as laid down in the British Courts of Admiralty. 2. That the rule had not been rightly laid down in those courts, and consequently would not be adopted in those of the United States.

1. Did the rule laid down in the British Courts of Admiralty embrace this case? It appeared to the court that the case of The Phœnix was precisely in point. In that case a vessel was captured in a voyage from Surinam to Holland, and a part of the cargo was claimed by persons residing in Germany, then a neutral country, as the produce of their estates in Surinam. The counsel for the captors considered the law of the case as entirely settled. The counsel for the claimants did not controvert this position. They admitted it, but endeavored to extricate their

case from the general principle by giving it the protection of the treaty of Amiens. In pronouncing his judgment, Sir William Scott laid down the general rule thus: "Certainly nothing can be more decided and fixed, as the principle of this court, and of the Supreme Court, upon very solemn argument there, than that the possession of the soil does impress upon the owner the character of the country, so far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be. This has been so repeatedly decided, both in this and the Superior Court, that it is no longer open to discussion. No question can be made upon the point of law at this day." [1]

Afterwards, in the case of Vrow Anna Catharina, Sir William Scott laid down the rule, and stated its reason. "It cannot be doubted," said he, "that there are transactions so radically, and fundamentally national as to impress the national character, independent of peace or war, and the local residence of the parties. The produce of a person's own plantation in the colony of the enemy, though shipped in time of peace, is liable to be considered as the property of the enemy, by reason that the proprietor has incorporated himself with the permanent interests of the nation as a holder of the soil, and is to be taken as a part of that country in that particular transaction, independent of his own personal residence and occupation." [2]

It was contended that this rule, laid down with so much precision, did not embrace Mr. Bentzon's claim, because he had not "incorporated himself with the permanent interests of the nation." He acquired the property while Santa Cruz was a Danish colony, and he withdrew from the island when it became British.

This distinction did not appear to the court to be a sound one. The identification of the national character of the owner with that of the soil, in the particular transaction, is not placed on the dispositions with which he acquires the soil, or on his general national character. The acquisition of land in Santa Cruz bound the claimant, so far as respects that land, to the fate of Santa Cruz, whatever its destiny might be. While that island belonged

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[1] Robinson's Adm. Rep. vol. v. p. 21. The Phœnix.

[2] Robinson's Adm. Rep. vol. v. p. 167. The Vrow Anna Catharina.

to Denmark, the produce of the soil, while unsold, was, according to this rule, Danish property, whatever might be the general national character of the particular proprietor. When the island became British, the soil and its produce, while that produce remained unsold, were British. The general, commercial, or political character of Mr. Bentzon could not, according to this rule, affect that particular transaction. Although incorporated, so far as respects his general national character, with the permanent interests of Denmark, he was incorporated, so far as respected his plantation in Santa Cruz, with the permanent interests of Santa Cruz, which was at that time British; and though, as a Dane, he was at war with Great Brtain, and an enemy, yet as a proprietor of land in Santa Cruz, he was no enemy: he could ship his produce to Great Britain in perfect safety.

2. The case was therefore certainly within the rule as laid down by the British prize courts. The next inquiry was, how far that rule will be adopted in this country?

The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial States throughout Europe and America. This law is in part unwritten, and in part conventional. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this.

Without taking a comparative view of the justice or fairness of the rules established in the British prize courts, and of those established in the courts of other nations, there were circumstances not to be excluded from consideration, which give to those rules a claim to our consideration that we cannot entirely disregard. The United States having, at one time, formed a component part of the British empire, *their* prize law was our prize law. When we separated, it continued to be our prize law,

so far as it was adapted to our circumstances, and was not varied by the power which was capable of changing it.

It would not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British courts, is entitled to more respect than the recent rules of other countries. But a case professing to be decided entirely on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.

The rule laid down in The Phœnix was said to be a recent rule, because a case solemnly decided before the Lords Commissioners, in 1783, is quoted in the margin as its authority. But that case was not suggested to have been determined contrary to former practice or former opinions. Nor did the court perceive any reason for supposing it to be contrary to the rule of other nations in a similar case.

The opinion that ownership of the soil does, in some degree, connect the owner with the property, so far as respects that soil, was an opinion which certainly prevailed very extensively. It was not an unreasonable opinion. Personal property may follow the person anywhere; and its character, if found on the ocean, may depend on the domicile of the owner. But land is fixed. Wherever the owner may reside, that land is hostile or friendly according to the condition of the country in which it is placed. It was no extravagant perversion of principle, nor was it a violent offence to the course of human opinion to say, that the proprietor, so far as respects his interest in the land, partakes of its character, and that its produce, while the owner remains unchanged, is subject to the same disabilities.[1]

§ 22. National character of ships.

So, also, in general, and unless under special circumstances, the character of ships depends on the national character of the owner, as ascertained by his domicile; but if a vessel is navigating under the flag and pass of a foreign country, she is to be considered as bearing the national character of the country under whose flag she sails: she makes a part of its navigation, and is in every respect liable to be considered as a

[1] Cranch's Rep. vol. ix. p. 191–199. Thirty hogsheads of Sugar, Bentzon, Claimant.

vessel of the country; for ships have a peculiar character impressed upon them by the special nature of their documents, and are always held to the character with which they are so invested, to the exclusion of any claims of interest which persons resident in neutral countries may actually have in them. But where the cargo is laden on board in time of peace, and documented as foreign property in the same manner with the ship, with the view of avoiding alien duties, the sailing under the foreign flag and pass is not held conclusive as to the cargo. A distinction is made between the ship, which is held bound by the character imposed upon it by the authority of the government from which all the documents issue, and the goods, whose character has no such dependence upon the authority of the State. In time of war a more strict principle may be necessary; but where the transaction takes place in peace, and without any expectation of war, the cargo ought not to be involved in the condemnation of of the vessel, which, under these circumstances, is considered as incorporated into the navigation of that country whose flag and pass she bears.[1]

§ 23. Sailing under the enemy's license.

We have already seen that no commercial intercourse can be lawfully carried on between the subjects of States at war with each other, except by the special permission of their respective governments. As such intercourse can only be legalized in the subjects of one belligerent State by a license from their own government, it is evident that the use of such a license from the enemy must be illegal, unless authorized by their own government; for it is the sovereign power of the State alone which is competent to act on the considerations of policy by which such an exception from the ordinary consequences of war must be controlled. And this principle is applicable not only to a license protecting a direct commercial intercourse with the enemy, but to a voyage to a country in alliance with the enemy, or even to a neutral port; for the very act of purchasing or procuring the license from the enemy is an intercourse with him prohibited by the laws of war: and even supposing it to be gratuitously issued, it must be for the special

[1] Robinson's Adm. Rep. vol. i. p. 1. The Vigilantia. Vol. v. p. 161. The Vrow Anna Catharina. Dodson's Adm. Rep. vol. i. p. 131. The Success.

purpose of furthering the enemy's interests, by securing supplies necessary to prosecute the war, to which the subjects of the belligerent State have no right to lend their aid, by sailing under these documents of protection.[1]

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[1] Cranch's Rep. vol. viii. p. 181. The Julia. Ibid. p. 203. The Aurora. Wheaton's Rep. vol. ii. p. 143. The Ariadne. Vol. iv. p. 100. The Caledonia.

CHAPTER II.

RIGHTS OF WAR AS BETWEEN ENEMIES.

§ 1. Rights of war against an enemy.

In general it may be stated, that the rights of war, in respect to the enemy, are to be measured by the object of the war. Until that object is attained, the belligerent has, strictly speaking, a right to use every means necessary to accomplish the end for which he has taken up arms. We have already seen that the practice of the ancient world, and even the opinion of some modern writers on public law, made no distinction as to the means to be employed for this purpose. Even such institutional writers as Bynkershoek and Wolf, who lived in the most learned and not least civilized countries of Europe, at the commencement of the eighteenth century, assert the broad principle, that every thing done against an enemy is lawful; that he may be destroyed, though unarmed and defenceless; that fraud, and even poison, may be employed against him; and that an unlimited right is acquired by the victor to his person and property. Such, however, was not the sentiment and practice of enlightened Europe at the period when they wrote; since Grotius had long before inculcated milder and more humane principles, which Vattel subsequently enforced and illustrated, and which are adopted by the unanimous concurrence of all the public jurists of the present age.[1]

§ 2. Limits to the rights of war against the persons of an enemy.

The law of nature has not precisely determined how far an individual is allowed to make use of force, either to defend himself against an attempted injury, or to obtain reparation when refused by the aggressor, or to

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[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 1. Wolfius, Jus. Gent. § 878. Grotius, de Jur. Bel. ac. Pac. lib. iii. cap. 4, §§ 5–7. Vattel, Droit des Gens, liv. iii. ch. 8.

bring an offender to punishment. We can only collect from this law the general rule, that such use of force as is necessary for obtaining these ends is not forbidden. The same principle applies to the conduct of sovereign States, existing in a state of natural independence with respect to each other. No use of force is lawful, except so far as it is necessary. A belligerent has, therefore, no right to take away the lives of those subjects of the enemy whom he can subdue by any other means. Those who are actually in arms, and continue to resist, may be lawfully killed; but the inhabitants of the enemy's country who are not in arms, or who, being in arms, submit and surrender themselves, may not be slain, because their destruction is not necessary for obtaining the just ends of war. Those ends may be accomplished by making prisoners of those who are taken in arms, or compelling them to give security that they will not bear arms against the victor for a limited period, or during the continuance of the war. The killing of prisoners can only be justifiable in those extreme cases where resistance on their part, or on the part of others who come to their rescue, renders it impossible to keep them. Both reason and general opinion concur in showing, that nothing but the strongest necessity will justify such an act.[1]

§ 3. Exchange of prisoners of war.

According to the law of war, as still practised by savage nations, prisoners taken in war are put to death. Among the more polished nations of antiquity, this practice gradually gave way to that of making slaves of them. For this, again, was substituted that of ransoming, which continued through the feudal wars of the middle age. The present usage of exchanging prisoners was not firmly established in Europe until some time in the course of the seventeenth century. Even now, this usage is not obligatory among nations who choose to insist upon a ransom for the prisoners taken by them, or to leave their own countrymen in the enemy's hands until the termination of the war. Cartels for the mutual exchange of prisoners of war are regulated by special convention between the belligerent States, according to their respective interests and views of policy. Sometimes prisoners of war are permitted, by

[1] Rutherforth's Inst. b. ii. ch. 9, § 15.

capitulation, to return to their own country, upon condition not to serve again during the war, or until duly exchanged; and officers are frequently released upon their parole, subject to the same condition. Good faith and humanity ought to preside over the execution of these compacts, which are designed to mitigate the evils of war, without defeating its legitimate purposes. By the modern usage of nations, commissaries are permitted to reside in the respective belligerent countries, to negotiate and carry into effect the arrangements necessary for this object. Breach of good faith in these transactions can be punished only by withholding from the party guilty of such violation the advantages stipulated by the cartel; or, in cases which may be supposed to warrant such a resort, by reprisals or vindictive retaliation.[1] (*a*)

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[1] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 7, §§ 8, 9; cap. 11, §§ 9–13. Vattel, Droit des Gens, liv. iii. ch. 8, § 153. Robinson's Adm. Rep. vol. iii. Note, Appendix A. Correspondence between M. Otto, French Commissary of Prisoners in England, and the British Transport Board, 1801. Annual Register, vol. xliv. p. 265. (State Papers.) Wheaton's Hist. Law of Nations, pp. 162–164.

(*a*) [The Dutch were in the habit of selling any prisoners they took from the Barbary powers as slaves to the Spaniards; and ordinances relating to this subject were made in 1661 and 1664. From the treaties between the Porte and Austria, in 1791, and the Porte and Russia, in 1792, it appears that Christian prisoners were used as domestic slaves in Turkey at that period; but, by recent treaties with the Porte, prisoners are exchanged as between Christian States, and stipulations to the same effect were also made in a treaty between the Porte and Persia, in 1823, and in one between Russia and Persia, in 1828. In the Treaty of 1787, between the United States and Morocco, it was provided that, in the event of a war between the parties, all prisoners should be exchanged, and not used as slaves, and that any balance of prisoners should be redeemed, at the rate of one hundred Mexican dollars per man. Manning's Commentaries on the Law of Nations, p. 162. A cartel of 12th March, 1780, between England and France, after regulating, in the 18th article, the number of privates to be exchanged against officers, by the 19th article stipulates the money price to be paid, in default of the necessary number of officers or men to effect an exchange. This ransom, in the case of a field-marshal of France or an English field-marshal or captain-general, was fixed at £60 sterling. Martens, Recueil de Traités, tom. iii. p. 361. It seems to have been deemed necessary even in the Treaty of Amiens, of 1802, between Great Britain and the French and Batavian republics, to stipulate that the prisoners, on both sides, should be restored without ransom, (*seront restitués sans rançon.*) Id. tom. ii. Supp. p. 565. A cartel for the exchange of prisoners, between the United States and Great Britain — such arrangements, made during war between belligerents, not being deemed treaties in the sense of the Constitution — was ratified by the American Secretary of State, May 14,

§ 4. Persons exempt from acts of hostility.

All the members of the enemy State may lawfully be treated as enemies in a public war; but it does not therefore follow, that all these enemies may be lawfully treated alike; though we may lawfully destroy some of them, it does not therefore follow, that we may lawfully destroy all. For the general rule, derived from the natural law, is still the same, that no use of force against an enemy is lawful, unless it is necessary to accomplish the purposes of war. The custom of civilized nations, founded upon this principle, has therefore exempted the persons of the sovereign and his family, the members of the civil government, women and children, cultivators of the earth, artisans, laborers, merchants, men of science and letters, and, generally, all other public or private individuals engaged in the ordinary civil pursuits of life, from the direct effect of military operations, unless actually taken in arms, or guilty of some misconduct in violation of the usages of war, by which they forfeit their immunity.[1]

§ 5. Enemy's property, how far subject to capture and confiscation.

The application of the same principle has also limited and restrained the operations of war against the territory and other property of the enemy. From the moment one State is at war with another, it has, on general principles, a right to seize on all the enemy's property, of whatsoever kind and wheresoever found, and to appropriate the property thus taken to its own use, or to that of

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1813. It provided for American agents at Halifax and other places, and for British agents in the United States; and stipulated not only for an exchange of prisoners of the same rank, but for equivalents in men, where they were of different ranks. National Advocate, May 26, 1813. The Act of March 1, 1817, ch. 29, extended by the Act of March 3, 1823, ch. 70, authorized the War Department to settle the accounts of any person, who may have redeemed and purchased from captivity any citizen of the United States, taken prisoner during the late war with Great Britain, provided that in no case a greater sum than $150 is allowed for the ransom of any one person. U. S. Statutes at Large, vol. iii. pp. 351–788. The prisoners, whose ransom was thus provided for, were such as fell into the hands of the Indian allies of Great Britain, and many of whom were retained in captivity long after the termination of the war. Niles's Register, vol. ii. p. 382.]

[1] Rutherforth's Inst. b. ii. ch. 9, § 15. Vattel, Droit des Gens, liv. iii. ch. 8, §§ 145–147, 159. Klüber, Droit des Gens Moderne de l'Europe, Pt. II. tit. 2, sect. 2, ch. 1, §§ 245–247.

the captors. By the ancient law of nations, even what were called *res sacræ* were not exempt from capture and confiscation. Cicero has conveyed this idea in his expressive metaphorical language, in the Fourth Oration against Verres, where he says that "Victory made all the *sacred* things of the Syracusans *profane*." But by the modern usage of nations, which has now acquired the force of law, temples of religion, public edifices devoted to civil purposes only, monuments of art, and repositories of science, are exempted from the general operations of war. Private property on land is also exempt from confiscation, with the exception of such as may become booty in special cases, when taken from enemies in the field or in besieged towns, and of military contributions levied upon the inhabitants of the hostile territory. This exemption extends even to the case of an absolute and unqualified conquest of the enemy's country. In ancient times, both the movable and immovable property of the vanquished passed to the conqueror. Such was the Roman law of war, often asserted with unrelenting severity; and such was the fate of the Roman provinces subdued by the northern barbarians, on the decline and fall of the western empire. A large portion, from one third to two thirds, of the lands belonging to the vanquished provincials, was confiscated and partitioned among their conquerors. The last example in Europe of such a conquest was that of England, by William of Normandy. Since that period, among the civilized nations of Christendom, conquest, even when confirmed by a treaty of peace, has been followed by no general or partial transmutation of landed property. The property belonging to the government of the vanquished nation passes to the victorious State, which also takes the place of the former sovereign, in respect to the eminent domain. In other respects, private rights are unaffected by conquest.[1]

§ 6. Ravaging the enemy's territory, when lawful?

The exceptions to these general mitigations of the extreme rights of war, considered as a contest of force, all grow out of the same original principle of natural

[1] Vattel, Droit des Gens, liv. iii. ch. 9, § 13. Kluber, Droit des Gens Moderne de l'Europe, Pt. ii. tit. 2, sect. 2, ch. 1, §§ 250–253. Martens, Précis, &c., liv. viii. ch. iv. §§ 279–282.

law, which authorizes us to use against an enemy such a degree of violence, and such only, as may be necessary to secure the object of hostilities. The same general rule, which determines how far it is lawful to destroy the persons of enemies, will serve as a guide in judging how far it is lawful to ravage or lay waste their country. If this be necessary, in order to accomplish the just ends of war, it may be lawfully done, but not otherwise. Thus, if the progress of an enemy cannot be stopped, nor our own frontier secured, or if the approaches to a town intended to be attacked cannot be made without laying waste the intermediate territory, the extreme case may justify a resort to measures not warranted by the ordinary purposes of war. If modern usage has sanctioned any other exceptions, they will be found in the right of reprisals, or vindictive retaliation. The whole international code is founded upon reciprocity. The rules it prescribes are observed by one nation, in confidence that they will be so by others. Where, then, the established usages of war are violated by an enemy, and there are no other means of restraining his excesses, retaliation may justly be resorted to by the suffering nation, in order to compel the enemy to return to the observance of the law which he has violated.[1]

Discussions between the American and British governments upon this subject, during the late war.

The last war between the United States and Great Britain was marked by a series of destructive measures on the part of the latter, directed against both persons and property hitherto deemed exempt from hostilities by the general usage of civilized nations. These measures were attempted to be justified, as acts of retaliation for similar excesses on the part of the American forces on the frontiers of Canada, in a letter addressed to Mr. Secretary Monroe, by Admiral Cochrane, commanding the British naval forces on the North American station, dated on board his flagship in the Patuxent river, on the 18th of August, 1814. In this communication it was stated that the British admiral, having been called upon by the governor-general of the Canadas to aid him in carrying into effect measures of retaliation against the inhabit-

[1] Vattel, liv. iii. ch. 8, § 142; ch. 9, §§ 166–173. Martens, Précis du Droit des Gens Moderne de l'Europe, liv. viii. ch. 4, §§ 272–280. Klüber, Pt. ii. tit. 2, sect. 2, ch. 1, §§ 262–265.

ants of the United States, for the wanton destruction committed by their army in Upper Canada, it had become the duty of the admiral to issue to the naval forces under his command an order to destroy and lay waste such towns and districts on the coast as might be found assailable.

In the answer of the American government to this communication, dated at Washington on the 6th of September, 1814, it was stated that it had seen, with the greatest surprise, that this system of devastation which had been practised by the British forces, so manifestly contrary to the usages of civilized warfare, was placed on the ground of retaliation. No sooner were the United States compelled to resort to war against Great Britain, than they resolved to wage it in a manner most consonant to the principles of humanity, and to those friendly relations which it was desirable to preserve between the two nations, after the restoration of peace. They perceived, however, with the deepest regret, that a spirit alike just and humane, was neither cherished nor acted on by the British government. Without dwelling on the deplorable cruelties committed by the Indian savages, in the British ranks and in British pay, at the river Raisin, which had never been disavowed or atoned for, the American government referred, as more particularly connected with the subject of the above communication, to the wanton desolation that was committed, in 1813, at Havre-de-Grace and Georgetown, in the Chesapeake Bay. These villages were burnt and ravaged by the British naval forces, to the ruin of their unarmed inhabitants, who saw with astonishment that they derived no protection to their property from the laws of war. During the same season, scenes of invasion and pillage, carried on under the same authority, were witnessed all along the shores of the Chesapeake, to an extent inflicting the most serious private distress, and under circumstances that justified the suspicion, that revenge and cupidity, rather than the manly motives that should dictate the hostility of a high-minded foe, led to their perpetration. The late destruction of the houses of the government at Washington, was another act which came necessarily into view. In the wars of modern Europe, no example of the kind, even among nations the most hostile to each other, could be traced. In the course of ten years past, the capitals of the principal powers of the European continent had been conquered, and occupied alternately by the

victorious armies of each other, and no instance of such wanton and unjustifiable destruction had been seen. They must go back to distant and barbarous ages, to find a parallel for the acts of which the American government complained.

Although these acts of desolation invited, if they did not impose on that government the necessity of retaliation, yet in no instance had it been authorized.

The burning of the village of Newark, in Upper Canada, posterior to the early outrages above enumerated, was not executed on the principle of retaliation. The village of Newark adjoined Fort George, and its destruction was justified, by the officers who ordered it, on the ground that it became necessary in the military operations there. The act, however, was disavowed by the American government. The burning which took place at Long Point was unauthorized by the government, and the conduct of the officer had been subjected to the investigation of a military tribunal. For the burning at St. David's, committed by stragglers, the officer who commanded in that quarter was dismissed, without a trial, for not preventing it.

The American government stated, that it as little comported with any orders which had been issued to its military and naval commanders, as it did with the known humanity of the American nation, to pursue the system which had been adopted by the British. That government owed to itself, and to the principles it had ever held sacred, to disavow, as justly chargeable to it, any such wanton, cruel, and unjustifiable warfare. Whatever unauthorized irregularities might have been committed by any of its troops, it would have been ready, acting on the principles of sacred and eternal obligation, to disavow, and, as far as might be practicable, to repair them. But in the plan of desolating warfare which Admiral Cochrane's letter so explicitly made known, and which was attempted to be excused on a plea so utterly groundless, the American government perceived a spirit of deep-rooted hostility, which, without the evidence of such fact, it could not have believed to exist, or that it would have been carried to such an extremity for the reparation of injuries, of whatsoever nature they might be, not sanctioned by the law of nations, which the naval or military forces of either power might have committed against the other. That the government would always be ready to enter into reciprocal arrangements;

but should the British government adhere to a system of desolation, so contrary to the views and practices of the United States, so revolting to humanity, and so repugnant to the sentiments and usages of the civilized world, whilst it would be seen with the deepest regret, it must and would be met with a determination and constancy becoming a free people, contending in a just cause for their essential rights and their dearest interests.

In the reply of Admiral Cochrane to the above communication, dated on the 19th September, 1814, it was stated that he had no authority from his government to enter into any kind of discussion relative to the point contained in that communication. He had only to regret that there did not appear to be any hope that he should be authorized to recall his general order, which had been further sanctioned by a subsequent request from the governor-general of the Canadas. Until the admiral received instructions from his government, the measures he had adopted must be persisted in, unless remuneration should be made to the Canadians for the injuries they had sustained from the outrages committed by the troops of the United States.[1]

The disavowal of the burning of Newark by the American government had been communicated to the governor-general of the Canadas, who answered on the 10th February, 1814, that it had been with great satisfaction that he had received the assurance that it was unauthorized by the American government and abhorrent to every American feeling; that if any outrages had ensued, in the wanton and unjustifiable destruction of Newark, passing the bounds of just retaliation, they were to be attributed to the influence of irritated passions on the part of the unfortunate sufferers by that event, which it had not been possible altogether to restrain; and that it was as little congenial to the disposition of the British government as it was to that of the United States, deliberately to adopt any plan of hostilities which had for its object the devastation of private property.

Under these circumstances, the destruction of the Capitol, of the President's house, and other public buildings at Washington, in August, 1814, could not but be considered by the whole world

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1 Correspondence between Mr. Secretary Monroe and Admiral Cochrane, American State Papers, fol. edit. vol. iii. pp. 693, 694.

as a most unjustifiable departure from the laws of civilized warfare. In the debate which took place in the House of Commons on the 11th of April, 1815, on the Address to the Prince Regent on the treaty of peace with the United States, Sir James Mackintosh accused the ministers of culpable delay in opening the negotiations at Ghent; which, he said, could not be explained, except on the miserable policy of protracting the war for the sake of striking a blow against America. The disgrace of the naval war, of balanced success between the British navy and the new-born marine of America, was to be redeemed by protracted warfare, and by pouring their victorious armies upon the American continent. That opportunity, fatally for them, arose. If the Congress had opened in June, it was impossible that they should have sent out orders for the attack on Washington. They would have been saved from that success, which he considered as a thousand times more disgraceful and disastrous than the worst defeat. It was a success which had made their naval power hateful and alarming to all Europe. It was a success which gave the hearts of the American people to every enemy who might rise against England. It was an enterprise which most exasperated a people, and least weakened a government, of any recorded in the annals of war. For every justifiable purpose of present warfare, it was almost impotent. To every wise object of prospective policy, it was hostile. It was an attack, not against the strength or the resources of a State, but against the national honor and public affections of a people. After twenty-five years of the fiercest warfare, in which every great capital of the European continent had been spared, he had almost said respected, by enemies, it was reserved for England to violate all that decent courtesy towards the seats of national dignity, which, in the midst of enmity, manifest the respect of nations for each other, by an expedition deliberately and principally directed against palaces of government, halls of legislation, tribunals of justice, repositories of the muniments of property, and of the records of history; objects, among civilized nations, exempted from the ravages of war, and secured, as far as possible, even from its accidental operation, because they contribute nothing to the means of hostility, but are consecrated to purposes of peace, and minister to the common and perpetual interest of all human society. It seemed to him an aggravation of

this atrocious measure, that ministers had endeavored to justify the destruction of a distinguished capital, as a retaliation for some violences of inferior American officers, unauthorized and disavowed by their government, against he knew not what village in Upper Canada. To make such retaliation just, there must always be clear proof of the outrage; in general, also, sufficient evidence that the adverse government had refused to make due reparation for it; and, lastly, some proportion of the punishment to the offence. Here there was very imperfect evidence of the outrage — no proof of refusal to repair — and demonstration of the excessive and monstrous iniquity of what was falsely called retaliation. The value of a capital is not to be estimated by its houses, and warehouses, and shops. It consisted chiefly in what could be neither numbered nor weighed. It was not even by the elegance or grandeur of its monuments that it was most endeared to a generous people. They looked upon it with affection and pride as the seat of legislation, as the sanctuary of public justice, often as linked with the memory of past times, sometimes still more as connected with their fondest and proudest hopes of greatness to come. To put all these respectable feelings of a great people, sanctified by the illustrious name of Washington, on a level with half a dozen wooden sheds in the temporary seat of a provincial government, was an act of intolerable insolence, and implied as much contempt for the feelings of America as for the common sense of mankind.[1]

Restitution of the works of art in the Museum of the Louvre at Paris in 1815, to the countries from which they had been taken during the wars of the French revolution.

The invasion of France by the allied powers of Europe, in 1815, was followed by the forcible restitution of the pictures, statues, and other monuments of art, collected from different conquered countries during the wars of the French revolution, and deposited in the museum of the Louvre. The grounds upon which this measure was adopted are fully explained in a note delivered by the British minister, Lord Castlereagh, to the ministers of the other allied power at Paris, on the 11th September, 1815. In this note it was stated by the British plenipotentiary, that representations had been laid before the Congress, assembled in that capital, from the Pope, the Grand Duke of Tuscany, the

[1] Hansard's Parliamentary Debates, vol. xxx. pp. 526, 527.

King of the Netherlands, claiming, through the intervention of the allied powers, the restoration of the statues, pictures, and other works of art, of which their respective States had been successively stripped by the late revolutionary government of France, contrary to every principle of justice, and to the usages of modern warfare; — and the same having been referred for the consideration of his court, he had received the Prince Regent's commands to submit, for the consideration of his allies, the following remarks upon that interesting subject.

It was now the second time that the powers of Europe had been compelled, in vindication of their own liberties and for the settlement of the world, to invade France, and twice their armies had possessed themselves of the capital of the State, in which these, the spoils of the greater part of Europe were accumulated. The legitimate sovereign of France had as often, under the protection of those armies, been enabled to resume his throne, and to mediate for his people a peace with the allies, to the marked indulgence of which neither their conduct to their own monarch, nor towards other States, had given them just pretensions to aspire. That the purest sentiments of regard for Louis XVIII., deference for his ancient and illustrious house, and respect for his misfortunes, had invariably guided the allied councils, had been proved beyond a question, by their having, in 1814, framed the treaty of Paris on the basis of preserving to France its complete integrity; and still more, after their late disappointment, by the endeavors they were again making, ultimately to combine the substantial interests of France with such an adequate system of temporary precaution, as might satisfy what they owed to the security of their own subjects. But it would be the height of weakness, as well as of injustice, and, in its effects, much more likely to mislead than to bring back the people of France to moral and peaceful habits, if the allied sovereigns, to whom the world was anxiously looking up for protection and repose, were to deny that principle of integrity in its just and liberal application to other nations, their allies, (more especially to the feeble and the helpless,) which they were about, for a second time, to concede to a nation against which they had had occasion so long to contend in war. Upon what principle could France, at the close of such a war, expect to sit down with the same extent of possessions which she held before the revolution, and desire, at the same

time, to retain the ornamental spoils of all other countries? Was there any possible doubt of the issue of the contest, or of the power of the allies to effectuate what justice and policy required? If not, upon what principle would they deprive France of her late territorial acquisitions, and preserve to her the spoliations consisting of objects of art appertaining to those territories, which all modern conquerors had invariably respected, as inseparable from the country to which they belonged?

These remarks were amplified by a variety of considerations of political expediency, not necessary to be recapitulated, and the note concluded by declaring, that in applying a remedy to this offensive evil, it did not appear that any middle line could be adopted, which did not go to recognize a variety of spoliations, under the cover of treaties, if possible more flagrant in their character than the acts of undisguised rapine by which these remains were, in general, brought together. The principle of property, regulated by the claims of the territories from whence these works were taken, is the surest and only guide to justice; and perhaps there was nothing which would more tend to settle the public mind of Europe at this day, than such a homage on the part of the King of France, to a principle of virtue, conciliation, and peace.[1]

In the debate which took place in the House of Commons, on the 20th of February, 1816, on the peace with France, Sir Samuel Romilly, speaking incidentally of this proceeding, stated that he was by no means satisfied of its justice. It was not true that the works of art, deposited in the museum of the Louvre, had all been carried away as the spoils of war; many, and the most valuable of them, had become the property of France by express treaty stipulations; and it was no answer to say, that those treaties had been made necessary by unjust aggressions and unprincipled wars; because there would be an end of all faith between nations, if treaties were to be held not to be binding, because the wars out of which they arose were unjust, especially as there could be no competent judge to decide upon the justice of the war, but the nation itself. By whom, too, was it that this supposed act of justice and this "great

[1] Martens, Nouveau Recueil, tom. ii. p. 632.

moral lesson," as it was called, had been read? By the very powers who had, at different times, abetted France in these, her unjust wars. Among other articles carried from Paris, under the pretence of restoring them to their rightful owners, were the celebrated Corinthian horses which had been brought from Venice; but how strange an act of justice was this to give them back their statues, but not to restore to them those far more valuable possessions, their territory and their republic, which were, at the same time, wrested from the Venetians? But the reason of this was obvious: the city and the territory of Venice had been transferred to Austria by the treaty of Campo Formio, but the horses had remained the trophy of France; and Austria, whilst she was thus hypocritically reading this moral lesson to nations, not only quietly retained the rich and unjust spoils she had got, but restored these splendid works of art, not to the Venice which had been despoiled of them, the ancient, independent, republican Venice; but to Austrian Venice, — to that country, which, in defiance of all the principles she pretended to be acting on, she still retained as part of her own dominions.[1]

§ 7. Distinction between private property, taken at sea, or on land.

The progress of civilization has slowly, but constantly, tended to soften the extreme severity of the operations of war by land; but it still remains unrelaxed in respect to maritime warfare, in which the private property of the enemy taken at sea or afloat in port, is indiscriminately liable to capture and confiscation. This inequality in the operation of the laws of war, by land and by sea, has been justified by alleging the usage of considering private property, when captured in cities taken by storm, as booty; and the well-known fact that contributions are levied upon territories occupied by a hostile army, in lieu of a general confiscation of the property belonging to the inhabitants; and that the object of wars by land being conquest, or the acquisition of territory to be exchanged as an equivalent for other territory lost, the regard of the victor for those who are to be or have been his subjects, naturally restrains him from the exercise of his extreme rights in this particular; whereas, the object of maritime wars is the

[1] Life of Romilly, edited by his sons, vol. ii. p. 404.

destruction of the enemy's commerce and navigation, the sources and sinews of his naval power — which object can only be attained by the capture and confiscation of private property.

§ 8. What persons are authorized to engage in hostilities against the enemy.

The effect of a state of war, lawfully declared to exist, is to place all the subjects of each belligerent power in a state of mutual hostility. The usage of nations has modified this maxim, by legalizing such acts of hostility only as are committed by those who are authorized by the express or implied command of the State. Such are the regularly commisioned naval and military forces of the nation, and all others called out in its defence, or spontaneously defending themselves in case of urgent necessity, without any express authority for that purpose. Cicero tells us, in his *Offices*, that by the Roman fecial law, no person could lawfully engage in battle with the public enemy, without being regularly enrolled and taking the military oath. This was a regulation sanctioned both by policy and religion. The horrors of war would indeed be greatly aggravated, if every individual of the belligerent States was allowed to plunder and slay indiscriminately the enemy's subjects, without being in any manner accountable for his conduct. Hence it is that in land wars, irregular bands of marauders are liable to be treated as lawless banditti, not entitled to the protection of the mitigated usages of war as practised by civilized nations.[1]

§ 9. Non-commissioned captors.

It must probably be considered as a remnant of the barbarous practices of those ages when maritime war and piracy were synonymous, that captures made by private armed vessels, without a commission, not merely in self-defence, but even by attacking the enemy, are considered lawful, not indeed for the purpose of vesting the enemy's property thus seized in the captors, but to prevent their conduct from being regarded as piratical, either by their own government or by the other belligerent State. Property thus seized is condemned to the government as prize of war, or, as these captures are techni-

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[1] Vattel, Droit des Gens, liv. iii. ch. 15, §§ 223–228. Klüber, Droit des Gens Moderne de l'Europe, § 267.

cally called, Droits of Admiralty. The same principle is applied to the captures made by armed vessels commissioned against one power, when war breaks out with another; the captures made from that other are condemned, not to the captors, but to the government.[1]

§ 10. Privateers.

The practice of cruising with private armed vessels commissioned by the State, has been hitherto sanctioned by the laws of every maritime nation, as a legitimate means of destroying the commerce of an enemy. This practice has been justly arraigned as liable to gross abuses, as tending to encourage a spirit of lawless depredation, and as being in glaring contradiction to the more mitigated modes of warfare practised by land. Powerful efforts have been made by humane and enlightened individuals to suppress it, as inconsistent with the liberal spirit of the age. The treaty negotiated by Franklin, between the United States and Prussia, in 1785, by which it was stipulated that, in case of war, neither power should commission privateers to depredate upon the commerce of the other, furnishes an example worthy of applause and imitation. But this stipulation was not revived on the renewal of the treaty, in 1799; and it is much to be feared that, so long as maritime captures of private property are tolerated, this particular mode of injuring the enemy's commerce will continue to be practised, especially where it affords the means of countervailing the superiority of the public marine of an enemy.[2] (*a*)

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[1] Brown's Civ. and Adm. Law, vol. ii. p. 526, Appendix. Robinson's Adm. Rep. vol. iv. p. 72. The Abigail. Dodson's Adm. Rep. p. 397. The Georgiana. Sparks's Diplomatic Correspondence, vol. i. p. 443. Wheaton's Rep. vol. ii. Appendix, Note I. p. 7.

[2] Vattel, liv. iii. ch. 15, § 229. Franklin's Works, vol. ii. pp. 447, 530. Edinburgh Review, vol. viii. pp. 13–15. North American Review, vol. ii. (N. S.) pp. 166–196. Wheaton's Hist. Law of Nations, p. 308.

(*a*) [A proposition made by the Legislative Assembly, in 1792, to abolish the taking of private property and of privateering, by mutual arrangement among nations, met with no success, and at no time was privateering carried on more extensively than during the wars of the French Revolution. "Le décret proclamait l'abolition, 1°. de la prise des propriétés privées; 2°. de la course maritime, et invitation au pouvoir exécutif de négocier avec les puissances étrangères des traités sur ces bases nouvelles. Le succès ne répondit pas à cette entreprise.

§ 11. Title to property captured in war.

The title to property lawfully taken in war may, upon general principles, be considered as immediately divested from the original owner, and transferred to the

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La seule ville de Hambourg, très commerçante, il est vrai, mais entièrement dépourvue de marine militaire, adhéra à ce système philanthropique et philosophique." Hautefeuille, Droits des Nations Neutres, tom. i. p. 342.

France having, in her last war against Spain, declared that she would grant no commissions to privateers, and that neither the commerce of Spain herself, nor of neutral nations, should be molested by the naval force of France, except in the breach of a lawful blockade, President Monroe stated in his Annual Message, of 1823, to Congress, that instructions had been given to our ministers with France, Russia, and Great Britain, to propose to their respective governments the abolition, in all future hostilities, of private war on the sea. Annual Register, 1823, p. 185.*

This subject was fully brought to the notice of the British government during the negotiations, at London, in 1823–4, between the American minister, Mr. Rush, and the British plenipotentiaries, Messrs. Huskisson and Stratford Canning. Mr. Adams, Secretary of State, in his instructions of July 28, 1823, said: —

"We press no disavowal on her, (England,) but we think the present time eminently auspicious for urging upon her, *and upon others*, an object which has long been dear to the hearts and ardent in the aspirations of the benevolent and the wise; an object essentially congenial to the true spirit of Christianity, and, therefore, peculiarly fitting for the support of nations intent, in the same spirit, upon the final and total suppression of the slave trade; and of sovereigns who have given public pledges to the world of their determination to administer imperial dominion upon the genuine precepts of Christianity.

"The object to which I allude is the abolition of private war upon the sea.

"It has been remarked that, by the usages of modern war, the private property of an enemy is protected from seizure or confiscation, as such; and private war itself has been almost universally exploded *upon the land.* By an exception, the reason of which it is not easy to perceive, the private property of an enemy *upon the sea* has not so fully received the benefit of the same principle. Private war, banished by the tacit and general consent of Christian nations from their territories, has taken its last refuge upon the ocean, and there continues to disgrace and afflict them by a system of licensed robbery, bearing all the most atrocious characters of piracy. To a government intent, from motives of general benevolence and humanity, upon the final and total suppression of the slave trade, it cannot be unreasonable to claim her aid and coöperation to the abolition of private war upon the sea. From the time that the United States took their place among the nations of the earth, this has been one of their favorite objects. 'It is time,' said Dr. Franklin, (in a letter of 14th March, 1785,) 'it is high time, for the sake of humanity, that a stop were put to this enormity. The United States of America, though better situated than any European nation to

captor. This general principle is modified by the positive law of nations, in its application both to personal and real property.

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make profit by privateering, are, as far as in them lies, endeavoring to abolish the practice by offering, in all their treaties with other powers, an article, engaging solemnly that, in case of future war, no privateer shall be commissioned on either side, and that unarmed merchant ships, on both sides, shall pursue their voyages unmolested. This will be a happy improvement of the law of nations. The humane and the just cannot but wish general success to the proposition.'

"It is well known that, in the same year in which this letter was written, a treaty between the United States and the King of Prussia was concluded, by the 23d article of which this principle was solemnly sanctioned, in the form of a national compact."

In rendering an account of this negotiation, at its close, Mr. Rush writes to the Secretary of State, August 12, 1824: —

"I next said to the British plenipotentiaries, that the question of abolishing privateering and the capture of private property at sea, whether by national ships or by privateers, was one that I considered as standing apart from those on which their decision had been given to me. Upon this question, therefore, I desired them to understand that I was ready to treat, as of one occupying ground wholly its own.

"They replied, that they were not prepared to adopt this course. All other questions of a maritime nature having been shut out from the negotiation, there would be, they said, manifest inconvenience in going into that of abolishing private war upon the ocean. They considered it a question belonging to the same class with maritime questions, and one which, besides being totally new, as between the two governments, contemplated a most extensive change in the principles and practice of maritime war, as hitherto sanctioned by all nations. Such was their answer.

"This answer was given in the terms that I state, and so entered upon the protocol. But it is proper for me to remark, that no sentiment dropped from the British plenipotentiaries authorizing the belief, that they would have concurred in the object, if we had proceeded to the consideration of it. My own opinion, unequivocally, is, that Great Britain is not prepared to accede, under any circumstances, to the proposition for abolishing private war upon the ocean." Cong. Doc. Senate, 18th Cong. 2d Session, Confidential, pp. 50, 100.

Looking at the relative condition of the two countries, in the event of a war — the immense navy of the one, while the other must ever necessarily depend, at sea, on the conversion of its mercantile marine into private vessels of war, as it does on land, on the enrollment of volunteers to meet any exigency which may arise — it is, at this day, a source of equal astonishment that the United States ever made the proposition for the abolition of privateering, and that Great Britain declined it when made.

The treaties of the United States of 1778 with France, of 1794 with England, of 1782 with the Netherlands, of 1836 with Peru-Bolivia, of 1785 and 1799

As to personal property, or movables, the title is, in general, considered as lost to the former proprietor, as soon as the enemy has

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with Prussia, of 1795 with Spain, of 1783 and 1816 with Sweden, all provided, that if any citizen or subject of either of the contracting parties took a commission, or letters of marque, for privateering against the other, from any power with whom the other was at war, he should be treated as a pirate; and in the treaties of 1827 and 1828, renewing those with Sweden and Prussia, which had expired, this provision was retained. U. S. Statutes at Large, vol. viii. pp. 24, 127, 44, 493, 94, 172, 144, 74, 240, 354, 384. The above-mentioned treaties with England and France have expired, without this provision being renewed in any subsequent treaty; and, therefore, any prohibition on this subject, which may exist in those countries, beyond the obligation of neutrality, required by the law of nations, must depend on the internal laws of the respective States.

During the war between the United States and Mexico, Mexico made great efforts to induce the subjects of the neutral States of Europe to take commissions for privateers. England and France prohibited their subjects from accepting the offers made to them; and almost all the ordinances of neutral States, during war, forbid their subjects from accepting letters of marque from the belligerents, but they are, in general, without any adequate sanction for their enforcement. Hautefeuille, Droits des Nations Neutres, tome iv. p. 252. The President of the United States announced, in his message of December, 1846, that he had, immediately after Congress recognized the existence of war with Mexico, called the attention, and, as he conceived, with effect, of the Spanish government, to the provision of the 14th article of our treaty with that power, of the 20th of October, 1795, which is among those above enumerated.

The President, at the same time, recommended to Congress to provide, by law, for the trial and punishment, as pirates, of Spanish subjects, who should be found guilty of privateering against the United States. Annual Register, 1846, p. 340.

In the present war, between Russia, on the one side, and Turkey, England, and France, on the other, the other powers of Europe have strictly prohibited their subjects from any participation, by accepting letters of marque, or otherwise, in aiding the belligerents. An Austrian decree, of May 25, 1854, commences by stating that the use of letters of marque, or any participation in the armament of a vessel, no matter under what flag, is strictly forbidden to the subjects of his Imperial Majesty. He who shall infringe this order, will not only be deprived of the protection of the Austrian government, but will be liable to be punished by another State, and will also be proceeded against in the criminal courts of Austria. The entry of foreign privateers into Austrian ports is forbidden. Paris Moniteur, June 9, 1854.

The Queen of Spain issued an order, May, 1854, prohibiting proprietors, masters, or captains of Spanish merchant ships, from taking letters of marque from any foreign power, or giving them aid, unless in the cause of humanity, in the case of a fire or shipwreck. Even the Hawaiian government have issued a proclamation, prohibiting their subjects from engaging, (either directly or indirectly,)

acquired a firm possession; which, as a general rule, is considered as taking place after the lapse of twenty-four hours, or after the

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in privateering against the shipping or commerce of any of the belligerents, under the penalty of being treated and punished as pirates.

The King of Denmark, and the King of Sweden and Norway, have given notice to all friendly powers, that, during the existing contest, privateers will not be admitted into their ports, nor tolerated in the anchorage of their respective States. The Chargé d'Affaires of Denmark to the Secretary of State of the United States, January 20, 1854. The Chargé d'Affaires of Sweden to the same, January 28, 1854.

A great change would seem to have taken place in the public sentiment of Europe, especially of the British government, since 1824, on the subject of pr vateering. In communicating to the government of the United States the course which England and France purposed pursuing towards neutrals in the pending war, after stating, under the date of April 21, 1854, that their Majesties had, for the present, resolved not to authorize the issue of letters of marque, Mr. Crampton says: — "Her Britannic Majesty's government entertains the confident hope, that the United States government will receive with satisfaction the announcement of the resolutions thus taken, in common by the two allied governments; and that it will, in the spirit of just reciprocity, give orders that no privateer under Russian colors shall be equipped, or victualled, or admitted with its prizes, in the ports of the United States; and also that the citizens of the United States shall rigorously abstain from taking part in armaments of this nature, or in any measure opposed to the duties of a strict neutrality."

The Count de Sartiges addressed the Secretary of State, on 28th of April, 1854, to the same effect, on the part of the French government.

Mr. Marcy, in returning an answer to the English and French ministers, and which was expressed in the same terms to each of them, on the day of the date of the last note, remarks, that the "laws of this country impose severe restrictions not only upon its own citizens, but upon all persons who may be residents within any of the territories of the United States, against equipping privateers, receiving commissions, or enlisting men therein, for the purpose of taking part in any foreign war."

At an interview, in March, between Lord Clarendon and Mr. Buchanan, at which the former read the "declaration" in reference to neutrals, which had not yet been issued, he did not propose the conclusion of a treaty for the suppression of privateering, but he expressed a strong opinion against the practice, as inconsistent with modern civilization. He spoke in highly complimentary terms of the treaties of the United States with different nations, which stipulate that if one of the parties be neutral and the other belligerent, the subjects of the neutral accepting commissions, as privateers, to cruise against the other, from the opposing belligerent, shall be punished as pirates. Mr. Buchanan, in answer, stated that it did not seem to him possible, under existing circumstances, for the United States to agree to the suppression of privateering, unless the naval powers of the world would go one step further, and consent that war against

booty has been carried into a place of safety, *infra præsidia* of the captor.[1]

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private property should be abolished altogether upon the ocean, as it had already been upon the land. There was nothing really different, in principle or morality, between the act of a regular cruiser and that of a privateer in robbing a merchant vessel upon the ocean, and confiscating the property of private individuals on board, for the benefit of the captor. Suppose a war with Great Britain. The navy of Great Britain was vastly superior to that of the United States, in the number of vessels of war. The only means which we would possess to counterbalance, in some degree, their far greater numerical strength, would be to convert our merchant vessels, cast out of employment by the war, into privateers, and endeavor, by their assistance, to inflict as much injury on the British as they would be able to inflict on American commerce. On another occasion, Lord Clarendon spoke in high terms of our Neutrality Law of April 20, 1818, and pronounced it superior to their own, especially in regard to privateers.

Mr. Marcy, in his answer of the 13th of April, 1854, to Mr. Buchanan's despatches, says: — "Both Great Britain and France, as well as Russia, feel much concern as to the course which our citizens will take, in regard to privateering. The two former powers would, at this time, most readily enter into a convention, stipulating that the subjects or citizens of the party, being a neutral, who shall accept a commission, or letters of marque, and engage in the privateer service, the other party being a belligerent, may be treated as pirates. A stipulation to this effect is contained in several of our treaties; but I do not think the President would permit it to be inserted in any new one. His objection to it does not arise from a desire to have our citizens embark in foreign belligerent service; but, on the contrary, he would much regret to see them take such a course. Our laws go as far as those of any nation — I think further — in laying restraints upon them, in regard to going into foreign privateer service. This government is not prepared to listen to any proposition for a total suppression of privateering. It would not enter into any convention, whereby it would preclude itself from resorting to the merchant marine of the country, in case it should become a belligerent party." Cong. Doc. 33d Cong. 1st Sess. H. of Rep. Ex. Doc. No. 103.

The views of the American government will be found more fully stated in the notice taken by President Pierce, in the Annual Message of 1854-5, of the suggestion of Prussia to connect the abolition of privateering with the question of neutral rights, which it has been proposed by the United States to regulate by convention.

"The King of Prussia entirely approves of the project of a treaty to the same effect, submitted to him, but proposes an additional article providing for the renunciation of privateering. Such an article, for most obvious reasons, is

[1] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, § 3; cap. 9, § 14. Klüber, Droit des Gens Moderne de l'Europe, § 254. Vattel, Droit des Gens, liv. iii. ch. 13, § 196; ch. 14, § 209. Heffter, Das Europäische Völkerrecht, § 136.

§ 12. Recaptures and salvage.

As to ships and goods captured at sea, and afterwards recaptured, rules are adopted somewhat different from those which are applicable to other personal property. These rules depend upon the nature of the different classes of cases to which they are to be applied. Thus the recapture may be made either from a pirate; (*a*) from a captor, clothed

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much desired by nations having naval establishments, large in proportion to their foreign commerce. If it were adopted as an international rule, the commerce of a nation, having comparatively a small naval force, would be very much at the mercy of its enemy, in case of war with a power of decided naval superiority. The bare statement of the condition in which the United States would be placed, after having surrendered the right to resort to privateers, in the event of war with a belligerent of naval supremacy, will show that this government could never listen to such a proposition. The navy of the first maritime power in Europe is at least ten times as large as that of the United States. The foreign commerce of the nations is nearly equal, and about equally exposed to hostile depredations. In war between that power and the United States, without resort, on our part, to our mercantile marine, the means of our enemy to inflict injury upon our commerce, would be tenfold greater than ours to retaliate. We could not extricate our country from this unequal condition, with such an enemy, unless we at once departed from our present peaceful policy, and became a great naval power. Nor would this country be better situated, in war with one of the secondary naval powers. Though the naval disparity would be less, the greater extent and more exposed condition of our wide-spread commerce would give any of them a like advantage over us.

"The proposition to enter into engagements to forego resort to privateers, in case this country should be forced into war with a great naval power, is not entitled to more favorable consideration than would be a proposition to agree not to accept the services of volunteers for operations on land. When the honor or the rights of our country require it to assume a hostile attitude, it confidently relies upon the patriotism of its citizens, not ordinarily devoted to the military profession, to augment the army and navy, so as to make them fully adequate to the emergency which calls them into action. The proposal to surrender the right to employ privateers is professedly founded upon the principle, that private property of unoffending non-combatants, though enemies, should be exempt from the ravages of war; but the proposed surrender goes but little way in carrying out that principle, which equally requires that such private property should not be seized or molested by national ships of war. Should the leading powers of Europe concur in proposing, as a rule of international law, to exempt private property, upon the ocean, from seizure by public armed cruisers, as well as by privateers, the United States will readily meet them upon that broad ground." Cong. Doc. President's Message, 1854.]

(*a*) [The crown is, generally speaking, entitled to all *bona piratorum;* but if any person can establish a title to the goods, the title of the crown ceases. Hagg. Adm. Rep. vol. i. p. 144. The Hebe.]

with a lawful commission, but not an enemy; or, lastly, from an enemy.

Recaptures from pirates.

1. In the first case, there can be no doubt the property ought to be restored to the original owner; for as pirates have no lawful right to make captures, the property has not been divested. The owner has merely been deprived of his possession, to which he is restored by the recapture. For the service thus rendered to him, the recaptor is entitled to a remuneration in the nature of salvage.[1]

Thus, by the Marine ordinance of Louis XIV., of 1681, liv. iii. tit. 9, des Prises, art 10, it is provided, that the ships and effects of the subjects or allies of France, retaken from pirates, and claimed within a year and a day after being reported at the Admiralty, shall be restored to the owner, upon payment of one third of the value of the vessel and goods, as salvage. And the same is the law of Great Britain, but there is no doubt that the municipal law of any particular State may ordain a different rule as to its own subjects. Thus the former usage of Holland and Venice gave the whole property to the retakers, on the principle of public utility; as does that of Spain, if the property has been in the possession of the pirates twenty-four hours.[2]

Valin, in his commentary upon the above article of the French Ordinance, is of opinion that if the recapture be made by a foreigner, who is the subject of a State, the law of which gives to the recaptors the whole of the property, it could not be restored to the former owner: and he cites, in support of this opinion, a decree of the Parliament of Bordeaux, in favor of a Dutch subject, who had retaken a French vessel from pirates.[3] To this interpretation Pothier objects that the laws of Holland having no power over Frenchmen and their property within the territory of France, the French subject could not thereby be deprived of the property in his vessel, which was not divested by the piratical capture according to the law of nations, and that it ought con-

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1 Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 9, § 17. Loccenius, de Jur. Marit. lib. ii. c. 2, No. 4. Brown's Civ. and Adm. Law, vol. ii. c. 3, p. 461. "Ea quæ piratæ nobis ereripuerunt, non opus habent postliminio; quia jus gentium illis non concedit, ut jus dominii mutari possint." Dig. de Capt. et Postl. revers.

2 Grotius par Barbeyrac, liv. 3, ch. 9, § xvi. No. 1, and note.

3 Valin, Comm. sur l'Ord. liv. 3, tit. 9, art. 10.

sequently to be restored to him upon payment of the salvage prescribed by the ordinance.[1]

Under the term *allies* in this article are included *neutrals;* and Valin holds that the property of the subjects of friendly powers, retaken from pirates by French captors, ought not to be restored to them upon the payment of salvage, if the law of their own country gives it wholly to the retakers; otherwise there would be a defect of reciprocity, which would offend against that impartial justice due from one State to another.[2] (*a*)

Recapture of neutral property.

2. If the property be retaken from a captor clothed with a lawful commission, but not an enemy, there would still be as little doubt that it must be restored to the original owner. For the act of taking being in itself a wrongful act, could not change the property, which must still remain in him.

If, however, the neutral vessel thus recaptured, were laden with contraband goods destined to an enemy of the first captor, it may, perhaps, be doubted whether they should be restored, inasmuch as they were liable to be confiscated as prize of war to the first captor. Martens states the case of a Dutch ship, captured by the British, under the rule of the war of 1756, and recaptured by the French, which was adjudged to be restored by the Council of Prizes, upon the ground that the Dutch vessel could not have been justly condemned in the British prize courts. But if the case had been that of a trade, considered contraband by the law of nations and treaties, the original owner would not have been entitled to restitution.[3]

In general, no salvage is due for the recapture of neutral vessels

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[1] Pothier, Traité de Propriété, No. 101.

[2] Valin, Comm. sur l'Ord. liv. 3, tit. 9, art. 10.

(*a*) [Hautefeuille gives the same interpretation to the ordinance as Valin, and cites, also, for the rule of reciprocity, Massé. He however objects altogether to salvage, or at least to the allowance of so great an amount as one third, and with approbation refers to the treaty of 1783, art. 17, between Sweden and the United States, which provides for the restitution entire to the true proprietor of a vessel and merchandise belonging to the one party, retaken either from an enemy or from pirates, by a ship of war or privateer of the other. Droit des Gens Neutres, tom. 4, p. 427.]

[3] Martens, Essai sur les Prises et les Reprises, § 52. "Sa majesté a jugé pendant la dernière guerre, que la reprise du navire neutre fait par un corsaire Fran-

and goods, upon the principle that the liberation of a *bonæ fidæi* neutral from the hands of the enemy of the captor is no beneficial service to the neutral, inasmuch as the same enemy would be compelled by the tribunals of his own country to make restitution of the property thus unjustly seized.

It was upon this principle that the French council of prizes determined, in 1800, that the American ship Statira, captured by a British, and recaptured by a French cruiser, should be restored to the original owner, although the cargo was condemned as contraband or enemy's property. The sentence of the court was founded upon the conclusions of M. Portalis, who stated that the recapture of foreign neutral vessels by French cruisers, whether public ships or privateers, gave no title to the retakers. The French prize-code only applied to French vessels and goods recaptured from the enemy. According to the universal law of nations, a neutral vessel ought to be respected by all nations. If she is unjustly seized by the cruisers of any one belligerent nation, this is no reason why another should become an accomplice in this act of injustice, or should endeavor to profit by it. From this maxim it followed as a corollary that a foreign vessel, asserted to be neutral, and recaptured by a French cruiser from the enemy, ought to be restored on due proof of its neutrality. But, it might be asked, why treat a foreign vessel with more favor in this case than a French vessel? The reason was obvious. On the supposition on which the regulations relating to this matter were founded, the French ship fallen into the hands of the enemy would have been lost forever, if it had not been retaken; consequently the recapture is a prize taken from the enemy. If the case, however, be that of a foreign vessel, asserted to be neutral, the seizure of this vessel by the enemy does not render it *ipso facto* the property of the enemy, since its confiscation has not yet been pronounced by the competent judge; until that judgment has been pronounced, the vessel thus navigating under the neutral flag loses neither its national character nor its rights. Although it has been seized as prize of war, it may ultimately

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çais (lorsque le navire n'était pas chargé de marchandises prohibées, ni dans le cas d'être confisqué par l'ennemi) était nulle." Code des Prises, an 1784, tom. ii.

be restored to the original owner. Under such circumstances, the recapture of this vessel cannot transfer the property to the recaptor. The question of neutrality remains entire, and must be determined, before such a transmutation of property can take place. Such was the language of all public jurists, and such was the general usage of all civilized nations. It followed that the vessel in question was not confiscable by the mere fact of its having been captured by the enemy. Before such a sentence could be pronounced, the French tribunal must do what the enemy's tribunal would have done; it must determine the question of neutrality; and that being determined in favor of the claimant, restitution would follow of course.[1]

To this general rule, however, an important exception has been made, founded on the principle above quoted from the Code des Prises, in the case where the vessel or cargo recaptured was practically liable to be confiscated by the enemy. In that case, it is immaterial whether the property be justly liable to be thus confiscated according to the law of nations; since that can make no difference in the meritorious nature of the service rendered to the original owner by the recaptor. For the ground upon which salvage is refused by the general rule, is, that the prize courts of the captor's country will duly respect the obligations of that law; a presumption which, in the wars of civilized States, as they are usually carried on, each belligerent nation is bound to entertain in its dealings with neutrals. But if, in point of fact, those obligations are not duly observed by those tribunals, and, in consequence, neutral property is unjustly subjected to confiscation in them, a substantial benefit is conferred upon the original owner in rescuing his property from this peril, which ought to be remunerated by the payment of salvage. It was upon this principle that the Courts of Admiralty, both of Great Britain and the United States, during the maritime war which was terminated by the peace of Amiens, pronounced salvage to be due upon neutral property retaken from French cruisers. During the revolution in France, great irregularity and confusion had arisen in the prize code formerly adopted, and had crept into the tribunals of that country, by which neutral property was liable to con-

[1] Décision relative à la prise du navire le Statira, 6 Thermidor, an 8, pp. 2–4.

demnation upon grounds both unjust and unknown to the law of nations. The recapture of neutral property, which might have been exposed to confiscation by means of this irregularity and confusion, was, therefore, considered by the American and British courts of prize, as a meritorious service, and was accordingly remunerated by the payment of salvage.[1] These abuses were corrected under the consular government, and so long as the decisions of the Council of Prizes were conducted by that learned and virtuous magistrate, M. Portalis, there was no particular ground of complaint on the part of neutral nations as to the practical administration of the prize code until the promulgation of the Berlin decree in 1806. This measure occasioned the exception to the rule as to salvage to be revived in the practice of the British Courts of Admiralty, who again adjudged salvage to be paid for the recapture of neutral property which was liable to condemnation under that decree.[2] It is true that the decree had remained practically inoperative upon American property, until the condemnation of the cargo of The Horizon by the Council of Prizes, in October, 1807; and therefore it may perhaps be thought, in strictness, that the English Court of Admiralty ought not to have decreed salvage in the case of The Sansom, more especially as the convention of 1800, between the United States and France, was still in force, the terms of which were entirely inconsistent with the provisions of the Berlin decree. But as the cargo of The Horizon was condemned in obedience to the imperial rescript of the 18th September, 1807, having been taken before the capture of The Sansom, whether that rescript be considered as an interpretation of a doubtful point in the original decree, or as a declaration of an anterior and positive provision, there can be no doubt The Sansom would have been condemned under it; consequently a substantial benefit was rendered to the neutral owner by the recapture, and salvage was due on the principle of the exception to the general rule. And

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[1] Robinson's Adm. Rep. vol. ii. p. 299. The War Onskan. Vol. iv. p. 156. The Eleonora Catharina. Vol. v. p. 54. The Carlotta. Vol. vi. p. 104. The Huntress. Cranch's Rep. vol. i. p. 1. Talbot *v.* Seeman, Dallas' Rep. vol. iv. p. 34, S. C.

[2] Robinson's Adm. Rep. vol. vi. p. 410. The Sansom. Edward's Adm. Rep. vol. i. p. 254. The Acteon.

the same principle might justly be successively applied to the prize proceedings of all the belligerent powers during the last European war, which was characterized by the most flagrant violations of the ancient law of nations, which, in many cases, rendered the rescue of neutral property from the grasp of their cruisers and prize courts, a valuable service entitling the recaptor to a remuneration in the shape of salvage.

3. Lastly, the recapture may be made from an enemy.

Recapture from an enemy.

The *jus postliminii* was a fiction of the Roman law, by which persons or things taken by the enemy were held to be restored to their former state, when coming again under the power of the nation to which they formerly belonged. It was applied to free persons or slaves returning *postliminii;* and to real property and certain movables, such as ships of war and private vessels, except fishing and pleasure boats. These things, therefore, when retaken, were restored to the original proprietor, as if they had never been out of his control and possession.[1] Grotius attests, and his authority is supported by that of the Consolato del Mare, that by the ancient maritime law of Europe, if the thing captured were carried *infra præsidia* of the enemy, the *jus postliminii* was considered as forfeited, and the former owner was not entitled to restitution. Grotius also states, that by the more recent law established among the European nations, a possession of twenty-four hours was deemed sufficient to divest the property of the original proprietor, even if the captured thing had not been carried *infra præsidia*.[2] And Loccenius considers the rule of twenty-four hours possession as the general law of Christendom at the time when he wrote.[3] So, also, Byn-

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[1] Ins. lib. i. tit. 12, Dig. l. 49, tit. 15. "Navis longis atque onerariis, postliminium est, non piscatûs aut voluptatis causâ." Dig. 49.

[2] "Cui consequens esse videtur, ut in mari naves, et res aliæ captæ censeantur tum demum, cùm in navalia aut portus, aut ad eum locum ubi tota classis se tenet, perducta sunt: nam tunc desperari incipit recuperatio, sed *recentiori jure gentium* inter Europæos populos introductum, videmus, ut talia capta censeantur ubi per horas viginti quatuor in potestate hostium fuerint." Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, § 3. Consolato del Mare, cap. 287, § 1. Wheaton's Rep. vol. v. Appendix, p. 56. Ayala, de Jur. Bel. ac Pac. cap. v. Wheaton's Hist. Law of Nations, p. 45.

[3] Loccenius, de Jure Marit. lib. ii. cap. 4, § 4.

kershoek states the general maritime law to be, that if a ship or goods be carried *infra præsidia* of the enemy, or of his ally, or of a neutral, the title of the original proprietor is completely divested.[1]

Rule of amicable retaliation, or reciprocity, applied to recaptures of the property of allies.

Sir W. Scott, in delivering the judgment of the English Court of Admiralty, in the case of The Santa Cruz and other Portuguese vessels recaptured, in 1796 and 1797, from the common enemy by a British cruiser, stated that it was certainly a question of much curiosity to inquire what was the true rule on this subject. "When I say *the true rule*, I mean only the rule to which civilized nations, attending to just principles, ought to adhere; for the moment you admit, as admitted it must be, that the practice of nations is various, you admit that there is no rule operating with the proper force and authority of a general law. It may be fit there should be some rule, and it might be either the rule of immediate possession, or the rule of pernoctation and twenty-four hours possession; or it might be the rule of bringing *infra præsidia;* or it might be a rule requiring an actual sentence or condemnation: either of these rules might be sufficient for general practical convenience, although in theory perhaps one might appear more just than another: but the fact is that there is no such rule of practice. Nations concur in principles, indeed, so far as to require firm and secure possession; but these rules of evidence respecting that possession are so discordant, and lead to such opposite conclusions, that the mere unity of principle forms no uniform rule to regulate the general practice. But were the public opinion of European States more distinctly agreed on any principle, as fit to form the rule of the law of nations on this subject, it by no means follows that any one nation would lie under an obligation to observe it. That obligation could only arise from a reciprocity of practice in other nations; for, from the very circumstance of the prevalence of a different rule among other nations, it would become not only lawful, but necessary to that one nation to pursue a different conduct: for instance, were there a rule prevailing among other nations, that

[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5.

the immediate possession, and the very act of capture should divest the property from the first owner, it would be absurd in Great Britain to act towards them on a more extended principle, and to lay it down as a general rule, that a bringing *infra præsidia*, though probably the true rule, should in all cases of recapture be deemed necessary to divest the original proprietor of his right. The effect of adhering to such a rule would be gross injustice to British subjects; and a rule, from which gross injustice must ensue in practice, can never be the true rule of law between independent nations; for it cannot be supposed to be the duty of any country to make itself a martyr to speculative propriety, were that established on clearer demonstration than such questions will generally admit. Where mere abstract propriety, therefore, is on one side, and real practical justice on the other, the rule of substantial justice must be held to be the true rule of the law of nations between independent States.

"If I am asked, under the known diversity of practice on this subject, what is the proper rule for a State to apply to the recaptured property of its allies? I should answer, that the liberal and rational proceeding would be to apply in the first instance the rule of that country to which the recaptured property belongs. I admit the practice of nations is not so; but I think such a rule would be both liberal and just. To the recaptured, it presents his own consent, bound up in the legislative wisdom of his own country: to the recaptor, it cannot be considered as injurious, where the rule of the recaptured would condemn, whilst the rule of the recaptor prevailing among his own countrymen, would restore, it brings an obvious advantage; and even in case of immediate restitution, under the rules of the recaptured, the recapturing country would rest secure in the reliance of receiving reciprocal justice in its turn.

"It may be said, what if this reliance should be disappointed? — Redress must then be sought from retaliation; which, in the disputes of independent States, is not to be considered as vindictive retaliation, but as the just and equal measure of civil retribution. This will be their ultimate security, and it is a security sufficient to warrant the trust. For the transactions of States cannot be balanced by minute arithmetic; something must, on all occasions, be hazarded on just and liberal presumption.

"Or it may be asked, what if there is no rule in the country of the recaptured? — I answer, first, this is scarcely to be supposed; there may be no ordinance, no prize acts immediately applying to recapture; but there is a law of habit, a law of usage, a standing and known principle on the subject, in all civilized commercial countries: it is the common practice of European States, in every war, to issue proclamations and edicts on the subject of prize; but till they appear, Courts of Admiralty have a law and usage on which they proceed, from habit and ancient practice, as regularly as they afterwards conform to the express regulations of their prize acts. But secondly, if there should exist a country in which no rule prevails, — the recapturing country must of necessity apply its own rule, and rest on the presumption that *that* rule will be adopted and administered in the future practice of its allies.

"Again, it is said that a country applying to other countries their own respective rules, will have a practice discordant and irregular: it may be so; but it will be a discordance proceeding from the most exact uniformity of principle; it will be *idem per diversa*. It is asked, also, will you adopt the rules of Tunis and Algiers? If you take the people of Tunis and Algiers for your allies, undoubtedly you must; you must act towards them on the same rules of relative justice on which you conduct yourselves towards other nations. And upon the whole of these objections it is to be observed, that a rule may bear marks of apparent inconsistency, and yet contain much relative fitness and propriety; a regulation may be extremely unfit to be made, which yet shall be extremely fit, and shall indeed be the only fit rule to be observed towards other parties, who have originally established it for themselves.

"So much it might be necessary to explain myself on the mere question of propriety; but it is much more material to consider, what is the actual rule of the maritime law of England on this subject. I understand it to be clearly this, that the maritime law of England, having adopted a most liberal rule of restitution or salvage with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards British property on a less liberal principle. In such a case, it adopts their rule, and treats them according to their own measure of justice. This I consider to be the true state-

ment of the law of England on this subject: It was clearly so recognized in the case of The San Jago; a case which was not, as it has been insinuated, decided on special circumstances, nor on novel principles, but on principles of established use and authority in the jurisprudence of this country. In the discussion of that case, much attention was paid to an opinion found among the manuscript collections of a very distinguished practitioner in this profession, (Sir E. Simpson,) which records the practice and the rule as it was understood to prevail in his time. The rule is: that England restores, on salvage, to its allies; but if instances can be given of British property retaken by them and condemned as prize, the Court of Admiralty will determine their cases according to their own rule." [1]

American law adopts the rule of reciprocity as to restitution of the property of friendly nations, recaptured from an enemy.

The law of our own country proceeds on the same principle of reciprocity, as to the restitution of vessels or goods belonging to friendly foreign nations, and recaptured from the enemy by our ships of war. By the act of Congress of the 3d March, 1800, ch. xiv. § 3, it is provided that the vessels or goods of persons permanently resident within the territory, and under the protection of any foreign government in amity with the United States, and retaken by their vessels, shall be restored to the owner, he paying, for salvage, such portion of the value thereof, as by the law and usage of such foreign governments shall be required of any vessel or goods of the United States under like circumstances of recapture; and where no such law or usage shall be known, the same salvage shall be allowed as is provided in the case of the recapture of the property of persons resident within, or under the protection of the United States. Provided that no such vessel or goods shall be restored to such former owner, in any case where the same shall have been condemned as prize by competent authority, before the recapture; nor in any case, where by the law and usage of such foreign government, the vessels or goods of citizens of the United States would not be restored in like circumstances.

Laws of different countries as to recaptures.

It becomes then material to ascertain what is the law of different maritime nations on the subject of recaptures; and this must be sought for either in the prize

[1] Sir W. Scott, Robinson's Adm. Rep. vol. i. pp. 58–63.

code and judicial decisions of each country, or in the treaties by which they are bound to each other.

British law. The present British law of military salvage was established by the statutes of the 43d Geo. III. ch. 160, and the 45th Geo. III. ch. 72, which provide that any vessel, or goods therein, belonging to British subjects, and taken by the enemy as prize, which shall be retaken, shall be restored to the former owners, upon payment for salvage of one-eighth part of the value thereof, if retaken by his Majesty's ships; and if retaken by any privateer, or other ship or vessel under his Majesty's protection, of one sixth part of such value. And if the same shall have been retaken by the joint operation of his Majesty's ships and privateers, then the proper court shall order such salvage to be paid as shall be deemed fit and reasonable. But if the vessel so retaken shall appear to have been set forth by the enemy as a ship of war, then the same shall not be restored to the former owners, but shall be adjudged lawful prize for the benefit of the captors.

American law. The act of Congress of the 3d March, 1800, ch. xiv. §§ 1, 2, provides that, in case of recaptures of vessels or goods belonging to persons resident within, or under the protection of the United States, *the same not having been condemned as prize by competent authority*, before the recapture, shall be restored on payment of salvage of one eighth of the value if recaptured by a public ship; and if the recaptured vessel shall appear to have been set forth and armed as a vessel of war before such capture, or afterwards, and before the recapture, then the salvage to be one moiety of the value. If the recaptured vessel previously belonged to the Government of the United States, and be *unarmed*, the salvage is one sixth, if recaptured by a private vessel, and one twelfth, if recaptured by a public ship; if *armed*, then the salvage to be one moiety if recaptured by a private vessel, and one fourth if recaptured by a public ship. In respect to public armed ships, the cargo pays the same rate of salvage as the vessel, by the express words of the act; but in respect to private vessels, the rate of salvage (probably by some unintentional omission in the act) is the same on the cargo, whether the vessel be armed or unarmed.[1]

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[1] Cranch's Rep. vol. ix. p. 244. The Adeline.

It will be perceived, that there is a material difference between the American and British laws on this subject; the act of Parliament continuing the *jus postliminii* forever, between the original owners and recaptors, even if there has been a previous sentence of condemnation, unless the vessel retaken appears to have been set forth by the enemy as a ship of war; whilst the act of Congress continues the *jus postliminii* until the property is divested by a sentence of condemnation in a competent court, and no longer; which was also the maritime law of England, until the statute stepped in, and, *as to British subjects*, revived the *jus postliminii* of the original owner.

French law.

By the more recent French law on the subject of recaptures, if a French vessel be retaken from the enemy after being in his hands more than twenty-four hours, it is good prize to the recaptor; but if retaken before twenty-four hours have elapsed, it is restored to the owner, with the cargo, upon the payment of one third the value for salvage, in case of recapture by a privateer, and one thirtieth in case of recapture by a public ship. But in case of recapture by a public ship, after twenty-four hours possession, the vessel and cargo are restored on a salvage of one tenth.

Although the letter of the ordinances, previous to the revolution, condemned, as good prize, French property recaptured after being twenty-four hours in possession of the enemy, whether the same be retaken by public or private armed vessels; yet it it seems to have been the constant practice in France to restore such property when recaptured by the king's ships.[1] The reservation contained in the ordinance of the 15th of June, 1779, by which property recaptured after twenty-four hours possession by the enemy, was condemned to the crown, which reserved to itself the right of granting to the recaptors such reward as it thought fit, made the salvage discretionary in every case, it being regulated by the king in council according to circumstances.[2] (*a*)

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[1] Valin, sur l'Ord. liv. iii. tit. 9, art. 3. Traité des Prises, ch. 6, § 1, No. 8, § 88. Pothier, Traité de Propriété, No. 97. Emerigon, des Assurances, tom. i. p. 497.

[2] Emerigon, des Assurances, tom. i. p. 497.

(*a*) [L'ordonnance du 15 Juin, 1779, porte: En ce qui concerne les reprises faites par les vaisseaux, frégates, et autres bâtimens de sa majesté, le tiers sera adjugé à son profit, pour droit de recousse, si elle a été, faite dans les vingt quatre

France applies her own rule to the recapture of the property of her allies. Thus, the Council of Prizes decided on the 9th February, 1801, as to two Spanish vessels recaptured by a French privateer after the twenty-four hours had elapsed, that they should be condemned as good prize to the recaptor. Had the recapture been made by a public ship, whether before or after twenty-four hours possession by the enemy, the property would have been restored to the original owner, according to the usage with respect to French subjects, and on account of the intimate relation subsisting between the two powers.[1]

The French law also restores, on payment of salvage, even after twenty-four hours possession by the enemy, in cases where the enemy leaves the prize a derelict, or where it reverts to the original proprietor in consequence of the perils of the seas, without a military recapture. Thus the Marine Ordinance of Louis XIV., of 1681, liv. iii. tit. 9, art. 9, provides that, "if the vessel, without being recaptured, is abandoned by the enemy, or if in consequence of storms or other accident, it comes into the possession of our subjects, before it has been carried into an enemy's port, (avant qu'il ait été conduit dans aucun port ennemi); it shall be restored to the proprietor, who may claim the same within a year and a day, although it has been more than twenty-four hours in the possession of the enemy." Pothier is of opinion that the above words *avant qu'il ait été conduit dans aucun port ennemi*, are to be understood, not as restricting the right of restitution to the particular case mentioned of a vessel abandoned by the enemy before being carried into port, which case is mentioned

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heures, et après le dit délai, la reprise sera adjugée en entier à sa Majesté, comme par le passé. L'arrêté du 2 prairial an 2, qui règle aujourd' hui la matière adoucit un peu la rigueur de ces règlemens, en ce qui concerne les reprises faites par les vaisseaux de guerre, mais il faut remarquer qu' aujourd' hui nulle autorité n'a plus le droit de faire remise de la partie confisquée. Le navire recous doit être restitué au propriétaire avec sa cargaison, à la charge par lui de payer à l'équipage repreneur un trentième de la valeur, si la recousse a eu lieu avant l'expiration du délai de vingt quatre heures, et le dixième si elle a été faite après ce délai. Le droit de recousse pour les armateurs reste fixé au tiers dans la première hypothèse; dans la seconde, le bâtiment et la cargaison leur appartiennent en entier." Hautefeuille, Droit des gens neutres, t. iv. p. 391.]

[1] Pothier, de Propriété, No. 100. Emerigon, tom. i. p. 499. Azuni, Droit Maritime de l'Europe, Partie ii. ch. 4, § 11.

merely as an example of what ordinarily happens, "parceque c'est le cas ordinaire auquel un vaisseau échappé à l'ennemi qui l'a pris, ne pouvant pas guères lui échapper lorsqu'il a été conduit dans ses ports."[1] But Valin holds, that the terms of the ordinance are to be literally construed, and that the right of the original proprietor is completely divested by the carrying into an enemy's port. He is also of opinion that this species of salvage is to be likened to the case of shipwreck, and that the recaptors are entitled to one third of the value of property saved.[2] Azuni contends that the rule of salvage in this case is not regulated by the ordinance, but is discretionary, to be proportioned to the nature and extent of the service performed, which can never be equal to the rescue of property from the hands of the enemy by military force, or to the recovery of goods lost by shipwreck.[3] Emerigon is also opposed to Valin on this question.[4]

Spanish law.

Spain formerly adopted the law of France as to recaptures, having borrowed its prize code from that country ever since the accession of the house of Bourbon to the Spanish throne. In the case of The San Jago (mentioned in that of The Santa Cruz, before cited,) the Spanish law was applied, upon the principle of reciprocity, as the rule of British recapture of Spanish property. But by the subsequent Spanish prize ordinance of the 20th of June, 1801, art. 38, it was modified as to the property of friendly nations; it being provided that when the recaptured ship is not laden for enemy's account, it shall be restored, if recaptured by public vessels, for one eighth, if by privateers for one sixth salvage: provided that the nation to which such property belongs has adopted, or agrees to adopt, a similar conduct towards Spain. The ancient rule is preserved as to recaptures of Spanish property; it being restored without salvage, if recaptured by a king's ship before or after twenty-four hours possession; and if recaptured by a privateer within that time, upon payment of one half for salvage; if recaptured after that time, it is condemned to the recaptors. The Spanish law

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[1] Pothier, de Propriété, No. 99.

[2] Valin, sur l'Ord. in loco.

[3] Azuni, Droit Maritime, Partie ii. ch. 4, §§ 8, 9.

[4] Emerigon, des Assurances, tom. i. pp. 504–505. He cites in support of his opinion the Consolato del Mare, cap. 287, and Targa, cap. 46, No. 10.

has the same provisions with the French in cases of captured property becoming derelict, or reverting to the possession of the former owners by civil salvage. (*a*)

Portuguese law. Portugal adopted the French and Spanish law of recaptures, in her ordinances of 1704 and 1796. But in May, 1797, after The Santa Cruz was taken, and before the judgment of the English High Court of Admiralty was pronounced in that case, Portugal revoked her former rule by which twenty-four hours possession by the enemy divested the property of the former owner, and allowed restitution after that time, on salvage of one eighth, if the capture was by a public ship, and one fifth if by a privateer. In The Santa Cruz and its fellow cases, Sir W. Scott distinguished between recaptures made *before* and *since* the ordinance of May, 1797; condemning the former where the property had been twenty-four hours in the enemy's possession, and restoring the latter upon payment of the salvage established by the Portuguese ordinance.

Dutch law. The ancient law of Holland regulated restitution on the payment of salvage at different rates, according to the length of time the property had been in the enemy's possession.[1]

Danish law. The ancient law of Denmark condemned after twenty-four hours possession by the enemy, and restored, if the property had been a less time in the enemy's possession, upon payment of a moiety of the value of salvage. But the ordinance of the 28th March, 1810, restored Danish or allied property without regard to the length of time it might have been in the enemy's possession, upon payment of one third the value.

Swedish law. By the Swedish ordinance of 1788, it is provided, that the rates of salvage on Swedish property shall be one half the value, without regard to the length of time it may have been in the enemy's possession.

(*a*) [There is a special treaty on the subject of recapture between England and Spain, concluded 5th February, 1814, which fixes the salvage at one eighth when the recapture is made by a ship of war, and one sixth by a privateeer, or jointly by a privateer and ship of war. The restoration is made without reference to the time that the ship has remained in the captor's hands, or whether it has been brought into the port of the captor or been condemned. Hautefeuille, Droit des gens neutres, tom. iv. p. 413.]

[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5.

What constitutes a *setting forth as a vessel of war* has been determined by the British Courts of Prize, in cases arising under the clause in the act of Parliament, which may serve for the interpretation of our own law, as the provisions are the same in both. Thus it has been settled, that where a ship was originally armed for the slave-trade, and after capture an additional number of men were put on board, but there was no commission of war, and no additional arming, it was not a setting forth as a vessel of war under the act.[1] But a commission of war is decisive if there be guns on board.[2] And where the vessel, after the capture, has been fitted out as a privateer, it is conclusive against her, although when recaptured, she is navigating as a mere merchant ship; for where the former character of a captured vessel had been obliterated by her conversion into a ship of war, the legislature meant to look no further, but considered the title of the former owner forever extinguished.[3] Where it appeared that the vessel had been engaged in the military service of the enemy, under the direction of his minister of the marine, it was held as a sufficient proof of a setting forth as a vessel of war.[4] So where the vessel is armed, and is employed in the public military service of the enemy by those who have competent authority so to employ it, although it be not regularly commissioned.[5] But the mere employment in the enemy's military service is not sufficient; but if there be a fair semblance of authority in the person directing the vessel to be so employed, and nothing upon the face of the proceedings to invalidate it, the court will presume that he is duly authorized; and the commander of a single ship may be presumed to be vested with this authority as commander of a squadron.[6]

What constitutes a "setting forth as a vessel of war," under the prize act.

It is no objection to an allowance of salvage, or a recapture, that it was made by a non-commissioned vessel; it is the duty of every citizen to assist his fel-

Recapture by a non-commissioned vessel.

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1 Robinson's Adm. Rep. vol. vi. p. 320. The Horatio.
2 Dodson's Adm. Rep. vol. i. p. 105. The Ceylon.
3 Edwards' Adm. Rep. 185. The Actif.
4 Robinson's Adm. Rep. vol. iii. p. 65
5 Dodson's Adm. Rep. vol. i. p. 105. The Ceylon.
6 Dodson's Adm. Rep. vol. vol. i. p. 397. The Georgiana.

low citizens in war, and to retake their property out of the enemy's possession; and no commission is necessary to give a person so employed a title to the reward which the law allots to that meritorious act of duty.[1] And if a convoying ship recaptures one of the convoy, which has been previously captured by the enemy, the recaptors are entitled to salvage.[2] But a mere rescue of a ship engaged in the same common enterprize gives no right to salvage.[3]

To entitle a party to salvage, as upon a recapture, there must have been an actual or constructive capture; for military salvage will not be allowed in any case where the property has not been actually rescued from the enemy.[4] But it is not necessary that the enemy should have actual possession; it is sufficient if the property is completely under the dominion of the enemy.[5] If, however, a vessel be captured going in distress into an enemy's port, and is thereby saved, it is merely a case of *civil* and not of *military* salvage.[6] But to constitute a recapture, it is not necessary that the recaptors should have a bodily and actual possession; it is sufficient if the prize be actually rescued from the grasp of the hostile captor.[7] Where a hostile ship is captured, and afterwards recaptured by the enemy, and again recaptured from the enemy, the original captors are not entitled to restitution on paying salvage, but the last captors are entitled to the whole rights of prize; for, by the first recapture, the right of the original captors is entirely divested.[8] Where the original captors have abandoned their prize, and it is subsequently captured by other parties, the latter are solely entitled to the property.[9] But

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1 Robinson's Adm. Rep. vol. iii. p. 224. The Helen.

2 Robinson's Adm. Rep. vol. vi. p. 315. The Wight.

3 Edwards' Adm. Rep. vol. i. p. 66. The Belle.

4 Robinson's Adm. Rep. vol. iv. p. 147. The Franklin.

5 Robinson's Adm. Rep. vol. iii. p. 305. The Edward and Mary. Edwards' Adm. Rep. vol. i. p. 116. The Pensamento Felix.

6 Robinson's Adm. Rep. vol. iv. p. 147. The Franklin.

7 Robinson's Adm. Rep. vol. iii. p. 305. The Edward and Mary.

8 Robinson's Adm. Rep. vol. iv. p. 217. Note *a*. Wheaton's Rep. vol. i. p. 125. The Astrea. Valin, sur l'Ord., tom. ii. pp. 257–259. Traité des Prises, ch. 6, § 1. Pothier, de Propriété, No. 99.

9 Edwards' Adm. Rep. vol. i. p. 79. The Lord Nelson. Dodson's Adm. Rep. vol. i. p. 404. The Diligentia.

if the abandonment be involuntary, and produced by the terror of superior force, and especially if produced by the act of the second captors, the rights of the original captors are completely revived.[1] And where the enemy has captured a ship, and afterwards deserted the captured vessel, and it is then recaptured, this is not to be considered as a case of derelict; for the original owner never had the *animus delinquendi*, and therefore it is to be restored on payment of salvage; but as it is not strictly a recapture within the prize act, the rate of salvage is discretionary.[2] But if the abandonment by the enemy be produced by the terror of hostile force, it is a recapture within the terms of the act.[3] Where the captors abandon their prize, and it is afterwards brought into port by neutral salvors, it has been held that the neutral Court of Admiralty has jurisdiction to decree salvage, but cannot restore the property to the original belligerent owners; for by the capture, the captors acquired such a right of property as no neutral nation can justly impugn or destroy, and, consequently, the proceeds, (after deducting salvage,) belong to the original captors; and neutral nations ought not to inquire into the validity of a capture between belligerents.[4] But if the captors make a donation of the captured vessel to a neutral crew, the latter are entitled to a remuneration as salvors; but after deducting salvage, the remaining proceeds will be decreed to the original owner.[5] And it seems to be a general rule, liable to but few exceptions, that the rights of capture are completely divested by a hostile recapture, escape, or voluntary discharge of the captured vessel.[6] And the same principle seems applicable to a *hostile* rescue, but if the rescue be made by the *neutral* crew of a neutral ship, it may be doubtful how far such an illegal act, which involves the penalty of confiscation, would be held, in the prize courts of the captor's country, to divest his original right in case of a subsequent recapture.

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[1] Wheaton's Rep. vol. ii. p. 123. The Mary.

[2] Robinson's Adm. Rep. vol. iv. p. 216. The John and Jane.

[3] Robinson's Adm. Rep. vol. vi. p. 273. The Gage.

[4] Dallas' Rep. vol. iii. p. 188. The Mary Ford.

[5] Cranch's Rep. vol. viii. p. 227. The Adventure.

[6] Cranch's Rep. vol. iv. p. 293. Hudson *v.* Guestier, vol. vi. p. 281. S. C. Dodson's Adm. Rep. vol. i. p. 404. The Diligentia.

As to recaptors, although their right to salvage is extinguished by a subsequent hostile recapture and regular sentence of condemnation, divesting the original owners of their property, yet if the vessel be restored upon such recapture, and resume her voyage, either in consequence of a judicial acquittal, or a release by the sovereign power, the recaptors are redintegrated in their right of salvage.[1] And recaptors and salvors have a legal interest in the property, which cannot be divested by other subjects, without an adjudication in a competent court; and it is not for the government's ships or officers, or for other persons, upon the ground of superior authority, to dispossess them without cause.[2]

In all cases of salvage where the rate is not ascertained by positive law, it is in the discretion of the court, as well upon recaptures as in other cases.[3] And where, upon a recapture, the parties have entitled themselves to a *military* salvage, under the Prize Act, the court may also award them, in addition, a civil salvage, if they have subsequently rendered extraordinary services in rescuing the vessel in distress from the perils of the seas.[4]

§ 13. Validity of maritime captures, determined in the courts of the captor's country. Condemnation of property lying in the ports of an ally.

The validity of maritime captures must be determined in a court of the captor's government, sitting either in his own country or in that of its ally. This rule of jurisdiction applies, whether the captured property be carried into a port of the captor's country, into that of an ally, or into a neutral port. (*a*)

Respecting the *first* case, there can be no doubt. In the *second* case, where the property is carried into the

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1 Dodson's Adm. Rep. vol. i. p. 192. The Charlotte Caroline.

2 Ibid. p. 414. The Blendenhale.

3 Cranch's Rep. vol. i. p. 1. Talbot *v.* Seeman. Robinson's Adm. Rep. vol. iii. p. 308. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5.

4 Dodson's Adm. Rep. vol. i. p. 317. The Louisa.

(*a*) [The Supreme Court decided, that condemnations by Prize Courts in California, of vessels and cargoes seized and brought in there, during the war between the United States and Mexico, were not sustainable under the law of nations or the Constitution of the United States, though these tribunals were established with the sanction of the Executive Department of the government. The

port of an ally, there is nothing to prevent the government of the country, although it cannot itself condemn, from permitting

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prize courts within the districts of the United States, including the District of Columbia, had jurisdiction in such cases.

"All captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure, and the question of prize or no prize, can be determined in his own courts only, upon which he has conferred jurisdiction to try the question. And under the Constitution of the United States the judicial power of the General Government is vested in one Supreme Court, and in such inferior courts as Congress shall from time to time ordain and establish. Every Court of the United States, therefore, must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States. And neither the President, nor any military officer, can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals, in prize cases, nor to administer the law of nations.

"The courts established and sanctioned in Mexico, during the war, by the commanders of the American forces, were nothing more than the agents of the military power, to assist in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. They were not Courts of the United States, and had no right to adjudicate upon a question of prize or no prize; and the sentence of condemnation in the court of Monterey is a nullity, and can have no effect upon the rights of any party.

"A prize court, when a proper case is made for its interposition, will proceed to adjudicate and condemn the captured property, or award restitution, although it is not actually in the control of the court. It may always proceed *in rem*, whenever the prize, or proceeds of the prize, can be traced in the hands of any person whatever.

"As a general rule, it is the duty of the captor to bring it within the jurisdiction of a prize court of the nation to which he belongs, and to institute proceedings to have it condemned. This is required by the Act of Congress, in cases of capture by ships of war of the United States; and this act merely enforces the performance of a duty imposed upon the captor by the law of nations, which, in all civilized countries, secures to the captured a trial in a court of competent jurisdiction, before he can finally be deprived of his property.

"But there are cases where, from existing circumstances, the captor may be excused from the performance of this duty, and may sell or otherwise dispose of the property before condemnation. And where the commander of a national ship cannot, without weakening inconveniently the force under his command, spare a sufficient prize-crew to man the captured vessel, or where the orders of his government prohibit him from doing so, he may lawfully sell or otherwise dispose of the captured property in a foreign country, and may afterwards proceed

the exercise of that final act of hostility, the condemnation of the property of one belligerent to the other; there is a common interest between the two governments, and both may be presumed to authorize any measures conducing to give effect to their arms, and to consider each other's ports as mutually subservient. Such an adjudication is therefore sufficient, in regard to property taken in the course of the operations of a common war.

Property carried into a neutral port.

But where the property is carried into a *neutral* port, it may appear, on principle, more doubtful whether the validity of a capture can be determined even by a court of prize established in the captor's country; and the reasoning of Sir W. Scott, in the case of The Henrick and Maria, is certainly very cogent, as tending to show the irregularity of the practice; but he considered that the English Court of Admiralty had gone too far in its own practice of condemning captured vessels lying in neutral ports, to recall it to the proper purity of the original principle. In delivering the judgment of the Court of Appeals in the same case, Sir William Grant also held that Great Britain was concluded, by her own inveterate practice, and that neutral merchants were sufficiently warranted in purchasing under such a sentence of condemnation, by the constant adjudications of the British tribunals. The same rule has been adopted by the Supreme Court of the United States, as being justifiable on principles of convenience to belligerents as well as neutrals; and though the prize was in fact within a neutral jurisdiction, it was still to be considered as under the control of the captor, whose possession is considered as that of his sovereign.[1]

§ 14. Jurisdiction of the courts of the captor, how far exclusive.

This jurisdiction of the national courts of the captor, to determine the validity of captures made in war under the authority of his government, is exclusive of the judicial authority of every other country, with two ex-

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to adjudication in a court of the United States." Howard's Reports, vol. xiii. p. 515. Jecker *v.* Montgomery.]

[1] Robinson's Adm. Rep. vol. iv. p. 43; vol. vi. p. 138, Note (*a*). Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 5. Duponceau's Transl. Note, p. 38. Kent's Commentaries on American Law, vol. i. p. 103. Wheaton's Hist. Law of Nations, p. 321.

ceptions only : — 1. Where the capture is made within the territorial limits of a neutral State. 2. Where it is made by armed vessels fitted out within the neutral territory.[1]

In either of these cases, the judicial tribunals of the neutral State have jurisdiction to determine the validity of the captures thus made, and to vindicate its neutrality by restoring the property of its own subjects, or of other States in amity with it, to the original owners. These exceptions to the exclusive jurisdiction of the national courts of the captor, have been extended by the municipal regulations of some countries to the restitution of the property of their own subjects, in all cases where the same has been unlawfully captured, and afterwards brought into their ports; thus assuming to the neutral tribunal the jurisdiction of the question of prize or no prize, wherever the captured property is brought within the neutral territory. Such a regulation is contained in the marine ordinance of Louis XIV., of 1681, and its justice is vindicated by Valin, upon the ground that this is done by way of compensation for the privilege of asylum granted to the captor and his prizes in the neutral port. There can be no doubt that such a condition may be expressly annexed by the neutral State to the privilege of bringing belligerent prizes into its ports, which it may grant or refuse at its pleasure, provided it be done impartially to all the belligerent powers; but such a condition is not implied in a mere general permission to enter the neutral ports. The captor, who avails himself of such a permission, does not thereby lose the military possession of the captured property, which gives to the prize courts of his own country exclusive jurisdiction to determine the lawfulness of the capture. This jurisdiction may be exercised either whilst the captured property is lying in the neutral port, or the prize may be carried thence *infra præsidia* of the captor's country where the tribunal is sitting. In either case, the claim of any neutral proprietor, even a subject of the State into whose ports the captured vessel or goods may have been carried, must, in general, be asserted in the prize court of the belligerent country, which alone has jurisdiction of the question of prize or no prize.[2]

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[1] Wheaton's Rep. vol. iv. p. 298. The Estrella. Vol. vii. p. 283. The Santissima Trinidad.

[2] Valin, Comment. sur l'Ordon. de la Marine, liv. iii. tit. 9. Des Prises, art.

§ 15. Condemnation by consular tribunal sitting in the neutral country.

This jurisdiction cannot be exercised by a delegated authority in the neutral country, such as a consular tribunal sitting in the neutral port, and acting in pursuance of instructions from the captor's State. Such a judicial authority, in the matter of prize of war, cannot be conceded by the neutral State to the agents of a belligerent power within its own territory, where even the neutral government itself has no right to exercise such a jurisdiction, except in cases where its own neutral jurisdiction and sovereignty have been violated by the capture. A sentence of condemnation, pronounced by a belligerent consul in a neutral port, is, therefore, considered as insufficient to transfer the property in vessels or goods captured as prize of war, and carried into such port for adjudication.[1]

§ 16. Responsibility of the captor's government for the acts of its commissioned cruisers and courts.

The jurisdiction of the court of the capturing nation is conclusive upon the question of property in the captured thing. Its sentence forecloses all controversy respecting the validity of the capture, as between claimant and captors, and those claiming under them, and terminates all ordinary judicial inquiry upon the subject-matter. But where the responsibility of the captors ceases, that of the State begins. It is responsible to other States for the acts of the captors under its commission, the moment these acts are confirmed by the definitive sentence of the tribunals which it has appointed to determine the validity of captures in war.

Unjust sentence of a foreign court, ground of reprisals.

Grotius states that a judicial sentence, plainly against right, (*in re minimè dubiâ*,) to the prejudice of a foreigner, entitles his nation to obtain reparation by reprisals: — "For the authority of the judge (says he,) is not of the same force against strangers as against subjects. Here is the difference: subjects are bound up and concluded by the sentence of the judge, though it be unjust, so that they cannot lawfully oppose its execution, nor by force recover their own right,

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15, tom. ii. p. 274. Lampredi, Trattato del Commercio de' Popoli Neutrali in Tempo de Guerra, p. 228.

[1] Robinson's Adm. Rep. vol. i. p. 135. The Flad Oyen.

on account of the controlling efficacy of that authority under which they live. But strangers have coercive power, (that is, of reprisals, of which the author is treating,) though it be not lawful to use it so long as they can obtain their right in the ordinary course of justice." [1]

So, also, Bynkershoek, in treating the same subject, puts an unjust judgment upon the same footing with naked violence, in authorizing reprisals on the part of the State whose subjects have been thus injured by the tribunals of another State. And Vattel, in enumerating the different modes in which justice may be refused, so as to authorize reprisals, mentions "a judgment manifestly unjust and partial;" and though he states what is undeniable, that the judgments of the ordinary tribunals ought not to be called in question upon frivolous or doubtful grounds, yet he is manifestly far from attributing to them that sanctity which would absolutely preclude foreigners from seeking redress against them.[2]

These principles are sanctioned by the authority of numerous treaties between the different powers of Europe regulating the subject of reprisals, and declaring that they shall not be granted unless in case of *the denial of justice*. An unjust sentence must certainly be considered a denial of justice, unless the mere privilege of being heard before condemnation is all that is included in the idea of justice.

Distinction between municipal tribunals and courts of prize.

Even supposing that unjust judgments of municipal tribunals do not form a ground of reprisals, there is evidently a wide distinction in this respect between the ordinary tribunals of the State, proceeding under the municipal law as their rule of decision, and prize tribunals,

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[1] "Quod fieri intelligitur non tantum si in sontem aut debitorem judicium intra tempus idoneum obtineri nequeat, verum etiam si in re minimè dubiâ (nam in dubiâ re præsumptio est pro his qui ad judicia publicè electi sunt) plane contra jus judicatum sit. Nam auctoritas judicantis non idem in exteros quod in subditos valet. . . . . Hoc interest, quod subditi exsecutionem etiam injustæ sententiæ vi impedire, aut contra eam jus suum vi exsequi licitè non possunt, ob imperii in ipsos efficaciam: exteri autem jus habent cogendi, sed quo uti non liceat quàmdiu per judicium, suum possint obtinere." Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 2, § 5, No. 1.

[2] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 24. Vattel, Droit des Gens, liv. ii. ch. 18, § 350.

appointed by its authority, and professing to administer the law of nations to foreigners as well as subjects. The ordinary municipal tribunals acquire jurisdiction over the person or property of a foreigner by his consent, either *expressed* by his voluntarily bringing the suit, or *implied* by the fact of his bringing his person or property within the territory. But when courts of prize exercise their jurisdiction over vessels captured at sea, the property of foreigners is brought by force within the territory of the State by which those tribunals are constituted. By natural law, the tribunals of the captor's country are no more the rightful exclusive judges of captures in war, made on the high seas from under the neutral flag, than are the tribunals of the neutral country. The equality of nations would, on principle, seem to forbid the exercise of a jurisdiction thus acquired by force and violence, and administered by tribunals which cannot be impartial between the litigating parties, because created by the sovereign of the one to judge the other. Such, however, is the actual constitution of the tribunals, in which, by the positive international law, is vested the exclusive jurisdiction of prizes taken in war. But the imperfection of the voluntary law of nations, in its present state, cannot oppose an effectual bar to the claim of a neutral government seeking indemnity for its subjects who have been unjustly deprived of their property, under the erroneous administration of that law. The institution of these tribunals, so far from exempting, or being intended to exempt, the sovereign of the belligerent nation from responsibility for the acts of his commissioned cruisers, is designed to ascertain and fix that responsibility. Those cruisers are responsible only to the sovereign whose commissions they bear. So long as seizures are regularly made upon apparent grounds of just suspicion, and followed by prompt adjudication in the usual mode, and until the acts of the captors are confirmed by the sovereign in the sentences of the tribunals appointed by him to adjudicate in matters of prize, the neutral has no ground of complaint, and what he suffers is the inevitable result of the belligerent right of capture. But the moment the decision of the tribunal of the last resort has been pronounced, (supposing it not to be warranted by the facts of the case, and by the law of nations applied to those facts,) and justice has been thus finally denied, the capture and the condemnation become the acts of the State, for which the sovereign

is responsible to the government of the claimant. There is nothing more irregular in maintaining that the sovereign is responsible towards foreign States for the acts of his tribunals, than in maintaining that he is responsible for his own acts, which, in the intercourse of nations, are constantly made the ground of complaint, of reprisals, and even of war. No greater sanctity can be imputed to the proceedings of prize tribunals, even by the most extravagant theory of the conclusiveness of their sentences, than is justly attributed to the acts of the sovereign himself. But those acts, however binding upon his own subjects, if they are not conformable to the public law of the world, cannot be considered as binding upon the subjects of other States. A wrong done to them forms an equally just subject of complaint on the part of their government, whether it proceeds from the direct agency of the sovereign himself, or is inflicted by the instrumentality of his tribunals. The tribunals of a State are but a part, and only a subordinate part, of the government of that State. But the right of redress against injurious acts of the whole government, of the supreme authority, incontestibly exists in foreign States, whose subjects have suffered by those acts. Much more clearly then must it exist, when those acts proceed from persons, authorities, or tribunals, responsible to their own sovereign, but irresponsible to a foreign government, otherwise than by its action on their sovereign.

These principles, so reasonable in themselves, are also supported by the authority of the writers on public law, and by historical examples.

"The exclusive right of the State, to which the captors belong, to adjudicate upon the captures made by them," says Rutherforth, "is founded upon another; that is, its right to inspect into the conduct of the captors, both because they are members of it, and because it is responsible to all other States for what they do in war; since what they do in war is done either under its general or its special commission. The captors are therefore obliged, on account of the jurisdiction which the State has over their persons, to bring such ships or goods as they seize in the main ocean into their own ports, and they cannot acquire property in them until the State has determined whether they were lawfully taken or not. The right which their own State has to determine

this matter is so far an exclusive one, that no other State can claim to judge of their conduct until it has been thoroughly examined into by their own; both because no other State has jurisdiction over their persons, and likewise because no other State is answerable for what they do. But the State to which the captors belong, whilst it is thus examining into the conduct of its own members, and deciding whether the ships or goods which they have seized are lawfully taken or not, is determining a question between its own members and the foreigners who claim the property; and this controversy did not arise within its own territory, but in the main ocean. The right, therefore, which it exercises is not civil jurisdiction; and the civil law, which is peculiar to its own territory, is not the law by which it ought to proceed. Neither the place where the controversy arose, nor the parties who are concerned in it, are subject to this law. The only law by which this controversy can be determined, is the law of nature, applied to the collective bodies of civil societies, that is, the law of nations; unless, indeed, there have been any particular treaties made between the two States, to which the captors and the other claimants belong, mutually binding them to depart from such rights as the law of nations would otherwise have supported. Where such treaties have been made, they are a law to the two States, as far as they extend, and to all the members of them, in their intercourse with one another. The State, therefore, to which the captors belong, in determining what might or might not be lawfully taken, is to judge by these particular treaties, and by the law of nations taken together. This right of the State, to which the captors belong, to judge exclusively, is not a complete jurisdiction. The captors, who are its own members, are bound to submit to its sentence, though this sentence should happen to be erroneous, because it has a complete jurisdiction over their persons. But the other parties to the controversy, as they are members of another State, are only bound to submit to its sentence so far as this sentence is agreeable to the law of nations, or to particular treaties; because it has no jurisdiction over them, either in respect of their persons, or of the things that are the subject of the controversy. If justice, therefore, is not done to them, they may apply to their own State for a remedy; which may, consistently with the law of nations, give them a remedy, either by solemn war or reprisals.

In order to determine when their right to apply to their own State begins, we must inquire when the exclusive right of the other State to judge in this controversy ends. As this exclusive right is nothing else but the right of the State, to which the captors belong, to examine into the conduct of its own members before it becomes answerable for what they have done, such exclusive right cannot end until their conduct has been thoroughly examined. Natural equity will not allow that the State should be answerable for their acts, until those acts are examined by all the ways which the State has appointed for this purpose. Since, therefore, it is usual in maritime countries to establish not only inferior courts of marine, to judge what is and what is not lawful prize, but likewise superior courts of review, to which the parties may appeal, if they think themselves aggrieved by the inferior courts; the subjects of a neutral State can have no right to apply to their own State for a remedy against an erroneous sentence of an inferior court, till they have appealed to the superior court, or to the several superior courts, if there are more courts of this sort than one, and till the sentence has been confirmed in all of them. For these courts are so many means appointed by the State, to which the captors belong, to examine into their conduct; and, till their conduct has been examined by all these means, the State's exclusive right of judging continues. After the sentence of the inferior court has been thus confirmed, the foreign claimants may apply to their own State for a remedy, if they think themselves aggrieved; but the law of nations will not entitle them to a remedy, unless they have been actually aggrieved. When the matter is carried thus far, the two States become the parties in the controversy. And since the law of nature, whether it is applied to individuals or civil societies, abhors the use of force till force becomes necessary, the supreme rulers of the neutral State, before they proceed to solemn war or to reprisals, ought to apply to the supreme rulers of the other State, both to satisfy themselves that they have been rightly informed, and likewise to try whether the controversy cannot be adjusted by more gentle methods."[1]

In the celebrated report made to the British government, in

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[1] Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 19.

1753, upon the case of the reprisals granted by the King of Prussia, on account of captures made by the cruisers of Great Britain of the property of his subjects, the exclusive jurisdiction of the captor's country over captures made in war, by its commissioned cruisers, is asserted; and it is laid down that "the law of nations, founded upon justice, equity, convenience, and the reason of the thing, does not allow of reprisals, except in case of violent injuries, directed or supported by the State, and justice absolutely denied *in re minimè dubiâ*, by all the tribunals, and afterwards by the prince;" plainly showing that, in the opinion of the eminent persons by whom that paper was drawn up, if justice be denied in a clear case, by all the tribunals, and afterwards by the prince, it forms a lawful ground of reprisals against the nation by whose commissioned cruisers and tribunals the injury is committed. And that Vattel was of the same opinion, is evident from the manner in which he quotes this paper to support his own doctrine, that the sentences of the tribunals ought not to be made the ground of complaint by the State against whose subjects they are pronounced, "*excepting* the case of a refusal of justice, palpable and evident injustice, a manifest violation of rules and forms," &c.[1]

In the case above referred to, the King of Prussia (then neutral) had undertaken to set up within his own dominions a commission to reëxamine the sentences pronounced against his subjects in the British prize courts; a conduct which is treated by the authors of the report to the British government as an innovation, "which was never attempted in any country of the world before. Prize or no prize must be determined by courts of admiralty belonging to the power whose subjects made the capture." But the report proceeds to state, that "every foreign prince in amity has a right to demand that justice shall be done to his subjects in these courts, according to the law of nations, or particular treaties, where they are subsisting. If *in re minimè dubiâ*, these courts proceed upon foundations directly opposite to the law of nations, or subsisting treaties, the neutral State has a right to complain of such determination."

The King of Prussia did complain of the determinations of

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[1] Vattel, Droit des Gens, liv. ii. ch. 7, § 84.

the British tribunals, and made reprisals by stopping the interest upon a loan due to British subjects, and secured by hypothecation upon the revenues of Silesia, until he actually obtained from the British government an indemnity for the Prussian vessels unjustly captured and condemned. The proceedings of the British tribunals, though they were asserted by the British government to be the only legitimate mode of determining the validity of captures made in war, were not considered as excluding the demand of Prussia for redress upon the government itself.[1]

So, also, under the Treaty of 1794, between the United States and Great Britain, a mixed commission was appointed to determine the claim of American citizens, arising from the capture of their property by British cruisers, during the existing war with France, according to justice, equity, and the law of nations. In the course of the proceedings of this board, objections were made, on the part of the British government, against the commissioners proceeding to hear and determine any case where the sentence of condemnation had been affirmed by the Lords of Appeal in Prize Causes, upon the ground that full and entire credit was to be given to their final sentence; inasmuch as, according to the general law of nations, it was to be presumed that justice had been administered by this, the competent and supreme tribunal in matters of prize. But this objection was overruled by the board, upon the grounds and principles already stated, and a full and satisfactory indemnity was awarded in many cases where there had been a final sentence of condemnation.

Many other instances might be mentioned of arrangements between States, by which mixed commissions have been appointed to hear and determine the claims of the subjects of neutral powers, arising out of captures in war, not for the purpose of revising the sentences of the competent courts of prize, as between the captors and captured, but for the purpose of providing an adequate indemnity between State and State, in cases where satisfactory compensation had not been received in the ordinary course of justice. Although the theory of public law

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[1] Wheaton's Hist. Law of Nations, pp. 206–217.

treats prize tribunals, established by and sitting in the belligerent country, exactly as if they were established by and sitting in the neutral country, and as if they always adjudicated conformably to the international law common to both; yet it is well known that, in practice, such tribunals do take for their guide the prize ordinances and instructions issued by the belligerent sovereign, without stopping to inquire whether they are consistent with the paramount rule. If, therefore, the final sentences of these tribunals were to be considered as absolutely conclusive, so as to preclude all inquiry into their merits, the obvious consequence would be to invest the belligerent State with legislative power over the rights of neutrals, and to prevent them from showing that the ordinances and instructions, under which the sentences have been pronounced, are repugnant to that law by which foreigners alone are bound.

These principles have received recent confirmation in the negotiation between the American and Danish governments respecting the captures of American vessels and cargoes made by the cruisers of Denmark during the last war between that power and Great Britain. In the course of this negotiation, it was objected by the Danish ministers that the validity of these captures had been finally determined in the competent prize court of the belligerent country, and could not be again drawn in question. On the part of the American government, it was admitted that the jurisdiction of the tribunals of the capturing nation was exclusive and complete upon the question of prize or no prize, so as to transfer the property in the things condemned from the original owner to the captors, or those claiming under them; that the final sentence of those tribunals is conclusive as to the change of property operated by it, and cannot be again incidentally drawn in question in any other judicial forum; and that it has the effect of closing forever all private controversy between the captors and the captured. The demand which the United States made upon the Danish government was not for a judicial revision and reversal of the sentences pronounced by its tribunals, but for the indemnity to which the American citizens were entitled in consequence of the denial of justice by the tribunals in the last resort, and of the responsibility thus incurred by the Danish government for the acts of its cruisers and tribunals. The Danish government was, of course, free to adopt any mea-

sures it might think proper, to satisfy itself of the injustice of those sentences, one of the most natural of which would be a reëxamination and discussion of the cases complained of, conducted by an impartial tribunal under the sanction of the two governments, not for the purpose of disturbing the question of title to the specific property which had been irrevocably condemned, or of reviving the controversy between the individual captors and claimants which had been for ever terminated, but for the purpose of determining between government and government whether injustice had been done by the tribunals of one power against the citizens of the other, and of determining what indemnity ought to be granted to the latter.

The accuracy of this distinction was acquiesced in by the Danish ministers, and a treaty concluded, by which a satisfactory indemnity was provided for the American claimants.[1] (*a*)

§ 17. Title to real property, how transferred in war.—*Jus postliminii.*

We have seen that a firm possession, or the sentence of a competent court, is sufficient to confirm the captor's title to personal property or movables taken in war. A different rule is applied to real property, or immovables. The original owner of this species of property is entitled to what is called the benefit of postliminy, and the title acquired in war must be confirmed by a treaty of peace before it can be considered as completely valid. This rule cannot be frequently applied to the case of mere private property, which by the general usage of modern nations is exempt from confiscation. It only becomes practically important in questions arising out of alienations of real property, belonging to the government, made by the opposite belligerent, while in the military occupation of the country. Such a title must be expressly confirmed by the treaty of peace, or by the general operation of the cession of territory made by the enemy in such treaty. Until such confirmation, it continues liable to be divested by the *jus postliminii*. The pur-

[1] Martens, Nouveau Recueil, tom. viii. p. 350.

(*a*) [The American negotiator with Denmark was Mr. Wheaton, whose argument, at length, establishing the doctrines laid down in the text, in answer to the declaration of the Danish Commissioners, Count Schimmelmann and M. de Stemann, will be found in the Cong. Doc. H. R. Ex. Doc. 1831–2, No. 249, p. 24–30.]

chaser of any portion of the national domain takes it at the peril of being evicted by the original sovereign owner when he is restored to the possession of his dominions.[1]

§ 18. Good faith towards enemies.

Grotius has devoted a whole chapter of his great work to prove, by the consenting testimony of all ages and nations, that good faith ought to be observed towards an enemy. And even Bynkershoek, who holds that every other sort of fraud may be practised towards him, prohibits perfidy, upon the ground that his character of enemy ceases by the compact with him, so far as the terms of that compact extend. "I allow of any kind of deceit," says he, "perfidy alone excepted, not because any thing is unlawful against an enemy, but because when our faith has been pledged to him, so far as the promise extends, he ceases to be an enemy." Indeed, without this mitigation, the horrors of war would be indefinite in extent and interminable in duration. The usage of civilized nations has therefore introduced certain *commercia belli*, by which the violence of war may be allayed, so far as is consistent with its object and purposes, and something of a pacific intercourse may be kept up, which may lead, in time, to an adjustment of differences, and ultimately to peace.[2]

§ 19. Truce or armistice.

There are various modes in which the extreme rigor of the rights of war may be relaxed at the pleasure of the respective belligerent parties. Among these is that of a suspension of hostilities, by means of a truce or armistice. This may be either general or special. If it be general in its application to all hostilities in every place, and is to endure for a very long or indefinite period, it amounts in effect to a temporary

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[1] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, § 4; cap. 9, § 13. Vattel, Droit des Gens, liv. iii. ch. 13, §§ 197–200, 210, 212. Klüber, Droit des Gens Moderne de l'Europe, §§ 256–258. Martens, Précis, &c., liv. viii. ch. 4, § 282, *a*. Where the case of conquest is complicated with that of civil revolution, and a change of internal government recognized by the nation itself and by foreign States, a modification of the rule may be required in its practical application. Vide ante, Pt. I. ch. 2, § 11, p. 42.

[2] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 1. Robinson's Adm. Rep. vol. iii. p. 139. The Daifje.

peace, except that it leaves undecided the controversy in which the war originated. Such were the truces formerly concluded between the Christian powers and the Turks. Such, too, was the armistice concluded, in 1609, between Spain and her revolted provinces in the Netherlands. A partial truce is limited to certain places, such as the suspension of hostilities, which may take place between two contending armies, or between a besieged fortress and the army by which it is invested.[1]

§ 20. Power to conclude an armistice.

The power to conclude a universal armistice or suspension of hostilities is not necessarily implied in the ordinary official authority of the general or admiral commanding in chief the military or naval forces of the State. The conclusion of such a general truce requires either the previous special authority of the supreme power of the State, or a subsequent ratification by such power.[2]

A partial truce or limited suspension of hostilities may be concluded between the military and naval officers of the respective belligerent States, without any special authority for that purpose, where, from the nature and extent of their commands, such an authority is necessarily implied as essential to the fulfilment of their official duties.[3]

§ 21. Period of its operation.

A suspension of hostilities binds the contracting parties, and all acting immediately under their direction, from the time it is concluded; but it must be duly promulgated in order to have a force of legal obligation with regard to the other subjects of the belligerent States; so that if, before such notification, they have committed any act of hostility, they are not personally responsible, unless their ignorance be imputable to their own fault or negligence. But as the supreme power of the State is bound to fulfil its own engagements, or those made by its authority, express or implied, the government of the captor is bound, in the case of a suspension of hostilities by sea, to restore all prizes made in contravention of the armistice. To

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[1] Vattel, Droit des Gens, liv. iii. ch. 16, §§ 235, 236.

[2] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 22, § 8. Barbeyrac's Note. Vattel, Droit des Gens, liv. iii. ch. 16, §§ 233–238.

[3] Vide ante, Pt. III. ch. 2, §§ 3–4, p. 318.

prevent the disputes and difficulties arising from such questions, it is usual to stipulate in the convention of armistice, as in treaties of peace, a prospective period within which hostilities are to cease, with a due regard to the situation and distance of places.[1]

§ 22. Rules for interpreting conventions of truce.

Besides the general maxims applicable to the interpretation of all international compacts, there are some rules peculiarly applicable to conventions for the suspension of hostilities. The *first* of these peculiar rules, as laid down by Vattel, is that each party may do within his own territory, or within the limits prescribed by the armistice, whatever he could do in time of peace. Thus either of the belligerent parties may levy and march troops, collect provisions and other munitions of war, receive reinforcements from his allies, or repair the fortifications of a place not actually besieged.

The *second* rule is, that neither party can take advantage of the truce to execute, without peril to himself, what the continuance of hostilities might have disabled him from doing. Such an act would be a fraudulent violation of the armistice. For example: — in the case of a truce between the commander of a fortified town and the army besieging it, neither party is at liberty to continue works, constructed either for attack or defence, or to erect new fortifications for such purposes. Nor can the garrison avail itself of the truce to introduce provisions or succours into the town, through the passages or in any other manner which the besieging army would have been competent to obstruct and prevent, had hostilities not been interrupted by the armistice.

The *third* rule stated by Vattel, is rather a corollary from the preceding rules than a distinct principle capable of any separate application. As the truce merely suspends hostilities without terminating the war, all things are to remain in their antecedent state in the places, the possession of which was specially contested at the time of the conclusion of the armistice.[2]

It is obvious that the contracting parties may, by express com-

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[1] Grotius de Jur. Bel. ac Pac. lib. iii. cap. 21, § 5. Vattel, Droit des Gens, liv. iii. ch. 16, §§ 239.

[2] Vattel, Droit des Gens, liv. iii. ch. 16, §§ 245–251.

pact, derogate in any and every respect from these general conditions.

§ 23. Recommencement of hostilities on the expiration of truce.

At the expiration of the period stipulated in the truce, hostilities recommence as a matter of course, without any new declaration of war. But if the truce has been concluded for an indefinite, or for a very long period, good faith and humanity concur in requiring previous notice to be given to the enemy of an intention to terminate what he may justly regard as equivalent to a treaty of peace. Such was the duty inculcated by the Fecial college upon the Romans, at the expiration of a long truce which they had made with the people of Veii. That people had recommenced hostilities before the expiration of the time limited in the truce. Still it was held necessary for the Romans to send heralds and demand satisfaction before renewing the war.[1]

§ 24. Capitulations for the surrender of troops and fortresses.

Capitulations for the surrender of troops, fortresses, and particular districts of country, fall naturally within the scope of the general powers entrusted to military and naval commanders. Stipulations between the governor of a besieged place, and the general or admiral commanding the forces by which it is invested, if necessarily connected with the surrender, do not require the subsequent sanction of their respective sovereigns. Such are the usual stipulations for the security of the religion and privileges of the inhabitants, that the garrison shall not bear arms against the conquerors for a limited period, and other like clauses properly incident to the particular nature of the transaction. But if the commander of the fortified town undertake to stipulate for the perpetual cession of that place, or enter into other engagements not fairly within the scope of his implied authority, his promise amounts to a mere *sponsion*.[2]

The celebrated convention made by the Roman consuls with the Samnites, at the Caudine Forks, was of this nature. The

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[1] Liv. Hist. lib. iv. cap. 30. As to the laws of war observed by the Romans. See Wheaton's Hist. Law of Nations, pp. 20–25.

[2] Vide ante, Pt. III. ch. 2, § 4, p. 318.

conduct of the Roman senate in disavowing this ignominious compact, is approved by Grotius and Vattel, who hold that the Samnites were not entitled to be placed in *statu quo*, because they must have known that the Roman consuls were wholly unauthorized to make such a convention. This consideration seems sufficient to justify the Romans in acting on this occasion according to their uniform uncompromising policy, by delivering up to the Samnites the authors of the treaty, and persevering in the war until this formidable enemy was finally subjugated.[1]

The convention concluded at Closter-Seven, during the seven years' war, between the Duke of Cumberland, commander of the British forces in Hanover, and Marshal Richelieu, commanding the French army, for a suspension of arms in the north of Germany, is one of the most remarkable treaties of this kind recorded in modern history. It does not appear, from the discussions which took place between the two governments on this occasion, that there was any disagreement between them as to the true principles of international law applicable to such transactions. The conduct, if not the language of both parties, implies a mutual admission that the convention was of a nature to require ratification, as exceeding the ordinary powers of military commanders in respect to mere military capitulations. The same remark may be applied to the convention signed at El Arish, in 1800, for the evacuation of Egypt by the French army; although the position of the two governments, as to the convention of Closter-Seven, was reversed in that of El Arish, the British government refusing in the first instance to permit the execution of the latter treaty upon the ground of the defect in Sir Sidney Smith's powers, and, after the battle of Heliopolis, insisting upon its being performed by the French, when circumstances had varied and rendered its execution no longer consistent with their policy and interest. Good faith may have characterized the conduct of the British government in this instance, as was strenuously insisted by ministers in the parliamentary discussions to which the treaty gave rise, but there is at least no evidence of perfidy on the part of General Kleber. His conduct may rather be compared with that of the Duke of Cumberland at Closter-Seven,

[1] See the account given by Livy of this remarkable transaction.

(and it certainly will not suffer by the comparison,) in concluding a convention suited to existing circumstances, which it was plainly his interest to carry into effect when it was signed, and afterwards refusing to abide by it when those circumstances were materially changed. In these compacts, time is material: indeed it may be said to be of the very essence of the contract. If anything occurs to render its immediate execution impracticable, it becomes of no effect, or at least is subject to be varied by fresh negotiation.[1]

§ 25. Passports, safe-conducts, and licenses.

Passports, safe-conducts, and licenses, are documents granted in war to protect persons and property from the general operation of hostilities. The competency of the authority to issue them depends on the general principles already noticed. This sovereign authority may be vested in military and naval commanders, or in certain civil officers, either expressly, or by inevitable implication from the nature and extent of their general trust. Such documents are to be interpreted by the same rules of liberality and good faith with other acts of the sovereign power.[2]

§ 26. Licenses to trade with the enemy.

Thus a license granted by the belligerent State to its own subjects, or to the subjects of its enemy, to carry on a trade interdicted by war, operates as a dispensation with the laws of war, so far as its terms can be fairly construed to extend. The adverse belligerent party may justly consider such documents of protection as *per se* a ground of capture and confiscation; but the maritime tribunals of the State, under whose authority they are issued, are bound to consider them as lawful relaxations of the ordinary state of war. A license is an act proceeding from the sovereign authority of the State, which alone is competent to decide on all the considerations of political and commercial expediency, by which such an exception from the ordinary consequences of war must be controlled. Licenses,

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[1] Flassan, Histoire de la Diplomatie Française, tom. vi. pp. 97–107. Annual Register, vol. i. pp. 209–213, 228–234; vol. xlii. p. [219], pp. 223–233. State Papers, vol. xliii. pp. [28–34.]

[2] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 21, § 14. Vattel, Droit des Gens, liv. iii. ch. 17, §§ 265–277.

being high acts of sovereignty, are necessarily *stricti juris*, and must not be carried further than the intention of the authority which grants them may be supposed to extend. Not that they are to be construed with pedantic accuracy, or that every small deviation should be held to vitiate their fair effect. An excess in the quantity of goods permitted might not be considered as noxious to any extent, but a variation in their quality or substance might be more significant, because a liberty assumed of importing one species of goods, under a license to import another, might lead to very dangerous consequences. The limitations of time, persons, and places, specified in the license, are also material. The great principle in these cases is, that subjects are not to trade with the enemy, nor the enemy's subjects with the belligerent State, without the special permission of the government; and a material object of the control which the government exercises over such a trade is, that it may judge of the fitness of the persons, and under what restrictions of time and place such an exemption from the ordinary laws of war may be extended. Such are the general principles laid down by Sir W. Scott for the interpretation of these documents; but Grotius lays down the general rule, that safe-conducts, of which these licenses are a species, are to be liberally construed; *laxa quàm stricta interpretatio admittenda est.* And during the last war, licenses were eventually interpreted with great liberality in the British Courts of Prize.[1]

§ 27. Authority to grant licenses.

It was made a question in some cases in those courts, how far these documents could protect against British capture, on account of the nature and extent of the authority of the persons by whom they were issued. The leading case on this subject is that of The Hope, an American ship, laden with corn and flour, captured whilst proceeding from the United States to the ports of the Peninsula occupied by the British troops, and claimed as protected by an instrument granted by the British consul at Boston, accompanied by a certified copy of a letter from the admiral on the Halifax station. In pronouncing judgment in this case, Sir W. Scott observed, that the

[1] Chitty's Law of Nations, ch. 7. Kent's Commentaries on American Law, vol. i. p. 163, Note (*b*), 5th edit.

instrument of protection, in order to be effectual, must come from those who have a competent authority to grant such a protection, but that the papers in question came from persons who were vested with no such authority. To exempt the property of enemies from the effect of hostilities is a very high act of sovereign authority; if at any time delegated to persons in a subordinate station, it must be exercised either by those who have a special commission granted to them for the particular business, and who, in legal language, are called *mandatories;* or by persons in whom such a power is vested in virtue of any situation to which it may be considered incidental. It was quite clear that no consul in any country, particularly in an enemy's country, is vested with any such power in virtue of his station. *Ei rei non præponitur*, and, therefore, his acts in relation to it are not binding. Neither does the admiral, on any station, possess such authority. He has, indeed, power relative to the ships under his immediate command, and can restrain them from committing acts of hostility; but he cannot go beyond that; he cannot grant a safeguard of this kind beyond the limits of his own station. The protections, therefore, which had been set up did not result from any power incidental to the situation of the persons by whom they had been granted; and it was not pretended that any such power was specially intrusted to them for the particular occasion. If the instruments which had been relied upon by the claimants were to be considered as the naked acts of those persons, then they were, in every point of view, totally invalid. But the question was, whether the British government had taken any steps to ratify these proceedings, and thus to convert them into valid acts of state; for persons not having full power may make what, in law, are termed *sponsiones*, or, in diplomatic language, treaties *sub spe rati*, to which a subsequent ratification may give validity: *ratihabitio mandato æquiparatur*. The learned judge proceeded to show, that the British government had confirmed the acts of its officers, by the Order in Council of the 26th October, 1813, and accordingly decreed restitution of the property. In the case of The Reward, before the Lords of Appeal, the principle of this judgment was substantially confirmed; but in that of The Charles, and other similar cases, where certificates or passports of the same kind, signed by Admiral Sawyer, and also by the Spanish minister in the United States, had been used for

voyages from thence to the Spanish West Indies, the Lords of Appeal held that these documents, not being included within the terms of the confirmatory Order in Council, did not afford protection. In the cases of passports granted by the British minister in the United States, permitting American vessels to sail with provisions from thence to the island of St. Bartholomew, but not confirmed by an Order in Council, the Lords condemned in all the cases not expressly included within the terms of the Order in Council, by which certain descriptions of licenses granted by the minister had been confirmed.[1]

§ 28. Ransom of captured property.

The contract made for the ransom of enemy's property, taken at sea, is generally carried into effect by means of a safe-conduct granted by the captors, permitting the captured vessel and cargo to proceed to a designated port, within a limited time. Unless prohibited by the law of the captor's own country, this document furnishes a complete legal protection against the cruisers of the same nation, or its allies, during the period, and within the geographical limits, prescribed by its terms. This protection results from the general authority to capture, which is delegated by the belligerent State to its commissioned cruisers, and which involves the power to ransom captured property, when judged advantageous. If the ransomed vessel is lost by the perils of the sea, before her arrival, the obligation to pay the sum stipulated for her ransom is not thereby extinguished. The captor guarantees the captured vessel against being interrupted in its course, or retaken, by other cruisers of his nation, or its allies, but he does not insure against losses by the perils of the seas. Even where it is expressly agreed that the loss of the vessel by these perils shall discharge the captured from the payment of the ransom, this clause is restrained to the case of a total loss on the high seas, and is not extended to shipwreck or stranding, which might afford the master a temptation fraudulently to cast away his vessel, in order to save the most valuable part of the cargo, and avoid the payment of the ransom. Where the ransomed vessel, having exceeded the time or deviated from the course prescribed by the ransom-bill, is retaken,

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[1] Dodson's Adm. Rep. vol. i. p. 226. The Hope. Ibid. Appendix (D.) Stewart's Vice Adm. Rep. p. 367.

the debtors of the ransom are discharged from their obligation, which is merged in the prize, and the amount is deducted from the net proceeds thereof, and paid to the first captor, whilst the residue is paid to the second captor. So, if the captor, after having ransomed a vessel belonging to the enemy, is himself taken by the enemy, together with the ransom-bill, of which he is the bearer, this ransom-bill becomes a part of the capture made by the enemy; and the persons of the hostile nation who were debtors of the ransom are thereby discharged from their obligation. The death of the hostage taken for the faithful performance of the contract on the part of the captured, does not discharge the contract; for the captor trusts to him as a collateral security only, and, by losing it, does not also lose his original security, unless there is an express agreement to that effect.[1]

Sir William Scott states, in the case of The Hoop, that, as to ransoms, which are contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in the British courts of justice in his own proper person for the payment of the ransom, even before British subjects were prohibited by the statute 22 Geo. III. cap. 25, from ransoming enemy's property; but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country, for the recovery of his freedom. But the effect of such a contract, like that of every other which may be lawfully entered into between belligerents, is to suspend the character of enemy, so far as respects the parties to the ransom-bill; and, consequently, the technical objection of the want of a *persona standi in judicio* cannot, on principle, prevent a suit being brought by the captor, directly on the ransom-bill. And this appears to be the practice in the maritime courts of the European continent.[2]

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[1] Pothier, Traité de Propriété, Nos. 134–137. Valin, sur l'Ordonnance, liv. iii. tit. 9; des Prises, art. 19. Traité des Prises, ch. 11, Nos. 1–3.

[2] Robinson's Adm. Rep. vol. i. p. 201. The Hoop. See Lord Mansfield's judgment, in the case of Ricord *v.* Bettenham, Burrow's Rep. p. 1734. Pothier, Propriété, Nos. 136, 137.

CHAPTER III.

RIGHTS OF WAR AS TO NEUTRALS.

§ 1. Definition of neutrality.

It deserves to be remarked, that there are no words in the Greek or Latin language which precisely answer to the English expressions, *neutral* and *neutrality*. The terms *neutralis*, *neutralitas*, which are used by some modern writers, are barbarisms, not to be met with in any classical author. The Roman civilians and historians make use of the words *amici*, *medii*, *pacati*, *socii*, which are very inadequate to express what we understand by *neutrals*, and they have no substantive whatever corresponding to *neutrality*. The cause of this deficiency is obvious. According to the laws of war, observed even by the most civilized nations of antiquity, the right of one nation to remain at peace, whilst other neighboring nations were engaged in war, was not admitted to exist. He who was not an ally was an enemy; and as no intermediate relation was known, so no word had been invented to express such relation. The modern public jurists, who wrote in the Latin language, were consequently driven to the necessity of inventing terms, to express those international relations which were unknown to the Pagan nations of antiquity, and which had grown out of a milder dispensation, struggling against the inveterate customs of the dark ages which preceded the revival of letters. Grotius terms neutrals *medii*, "middle men."[1] Bynkershoek, in treating of the subject of neutrality, says:—"*Non hostes* appello, qui neutrarum partium sunt, nec ex fœdere his illisve quicquam debent; si quid debeant, Fœderati sunt, non simplicitur Amici."[2]

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1 Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 9.

2 "I call *neutrals* (non hostes) those who take part with neither of the belligerent powers, and who are not bound to either by any alliance. If they are so bound, they are no longer *neutrals* but *allies*. Bynkershoek, Quæst. Jur. Pub.

§ 2. Different species of neutrality.

There are two species of neutrality recognized by international law. These are, 1st. Natural, or perfect neutrality; and 2d. Imperfect, qualified, or conventional neutrality.

§ 3. Perfect neutrality.

1. Natural, or perfect neutrality, is that which every sovereign State has a right, independent of positive compact, to observe in respect to the wars in which other States may be engaged.

The right of every independent State to remain at peace, whilst other States are engaged in war, is an incontestable attribute of sovereignty. It is, however, obviously impossible, that neutral nations should be wholly unaffected by the existence of war between those communities with whom they continue to maintain their accustomed relations of friendship and commerce. The rights of neutrality are connected with correspondent duties. Among these duties is that of impartiality between the contending parties. The neutral is the common friend of both parties, and consequently is not at liberty to favor one party to the detriment of the other.[1] Bynkershoek states it to be "the duty of neutrals to be every way careful not to interfere in the war, and to do equal and exact justice to both parties. *Bello se non interponant*," that is to say, "as to what relates to the war, let them not prefer one party to the other, and this is the only proper conduct for neutrals. A neutral has nothing to do with the justice or injustice of the war; it is not for him to sit as judge between his friends, who are at war with each other, and to grant or refuse more or less to the one or the other, as he thinks that their cause is more or less just or unjust. If I am a neutral, I ought not to be useful to the one, in order that I may hurt the other."[2]

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lib. i. cap. 9. De Statu belli inter non hostes. We shall hereafter see that this definition is merely applicable to that species of neutrality which is not modified by special compact.

[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9. Vattel, Droit des Gens, liv. iii. ch. 7, §§ 103–110.

[2] "Horum officium est, omni modo cavere, ne se bello interponant, et his quàm illis partibus sint vel æquiores vel iniquiores. . . . *Bello se non interponant*, hoc est, in causâ belli alterum alteri ne perferant, et eo solo recte defunguntur, qui neutrarum partium sunt. . . . Si recte judico, belli justitia

These, Bynkershoek adds, are "the duties applicable to the condition of those powers who are not bound by any alliance, but are in a state of *perfect* neutrality. These I merely call *friends*, in order to distinguish them from confederates and allies." [1]

§ 4. Imperfect neutrality.

2. Imperfect, qualified, or conventional neutrality, is that which is modified by special compact.

The public law of Europe affords several examples of this species of neutrality.

Neutrality of the Swiss Confederation.

1. Thus the political independence of the confederated Cantons of Switzerland, which had so long existed in fact, was first formally recognized by the Germanic Empire, of which they originally constituted an integral portion, at the peace of Westphalia, in 1648. The Swiss Cantons had observed a prudent neutrality during the thirty years war, and from this period to the war of the French Revolution, their neutrality had been, with some slight exceptions, respected by the bordering States. But this neutrality was qualified by the special compact existing between the Confederation, or the separate Cantons and foreign States, forming treaties of alliance or capitulations for the enlistment of Swiss troops in the service of those States. The policy of respecting the neutrality of Switzerland was mutually felt by the two great monarchies of France and Austria, during their long contest for supremacy under the houses of Bourbon and Hapsburg. Such is the peculiar geographical position of Switzerland, between Germany, France, and Italy, among the stupendous mountain chains from which flow the great rivers, the Danube, the Rhine, the Rhone, and the Po, that if the passage through the Swiss territories were open to the Austrian armies, they might communicate freely from the valley of the Danube to the valley of the

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vel injustitia nihil quicquam pertinet ad communem amicum; ejus non est, inter utrumque amicum, sibi invicem hostem, sedere judicem, et ex causâ æquiore vel iniquiore huic illive plus nimisve tribuere vel negare. Si medius sim, alteri non possum prodesse, ut alteri noceam." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. ix.

[1] "Exposui compendio quod mihi videtur de officio eorum, qui ex fœdere nihil quicquam debent, sed perfectè sunt neutrarum partium. Hos simpliciter *Amicos* appellavi, ut à Fœderatis et Sociis distinguerem." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9.

Po, and thus menace the frontier of France from Basle to Nice. To guard against this impending danger, France must be fortified along the whole of this frontier; whilst, on the other hand, if the passes of the Swiss Alps are shut against her enemy, she may concentrate all her forces upon the Rhine; since all history shows that the attempts of the Imperialists to penetrate into the southern provinces of France by the Var have ever failed, owing to the remoteness and difficulty of the scene of operations. The advantages to be derived by France from the permanent neutrality of Switzerland are therefore manifest. Nor is this neutrality less essential to the security of Austria. Let Switzerland once become a lawful battle ground for the bordering States, and the French armies would be sure to anticipate its occupation by the Austrians. The two great Austrian armies operating, whether for offence or defence, the one in Swabia, the other in Italy, being separated by the massive rampart of the Alps, would have no means of communicating with each other; whilst the French forces, advancing from the Lake of Constance on the one side, and the great chain of the Alps on the other, might attack either the flank of the Austrian army in Swabia or the rear of its army in Italy.[1]

During the wars of the French Revolution the neutrality of Switzerland was alternately violated by both the great contending parties, and her once peaceful valleys became the bloody scene of hostilities between the French, Austrian, and Russian armies. The expulsion of the allied forces, and the subsequent withdrawal of the French army of occupation, were followed by violent internal dissensions which were finally composed by the mediation of Bonaparte as First Consul of the French Republic, in 1803. A treaty of alliance was simultaneously concluded between the Republic and the Helvetic Confederation. According to the stipulations of this treaty, the neutrality of Switzerland was recognized by France, whilst the Confederation stipulated not to grant a passage through its territories to the armies of France, and to oppose such passage by force of arms in case of its being attempted. The Confederation also engaged to permit the enlisting of eight thousand Swiss troops for the service of France, in addition to the sixteen thousand troops to be furnished

[1] Thiers, Histoire du Consulat et de l'Empire, tom. i. liv. 3, p. 182.

according to the capitulation signed on the same day with the treaty. It was, at the same time, expressly declared that its alliance being merely defensive, should not, in any respect, be construed to prejudice the neutrality of Switzerland.[1]

When the allied armies advanced to invade the French territory, in 1813, the Austrian corps under Prince Schwartzenberg passed through the territory of Switzerland, and crossed the Rhine at three different places, at Basle, Lauffenberg, and Shaffhausen, without opposition on the part of the federal troops. The perpetual neutrality of Switzerland was, nevertheless, recognized by the final act of the Congress of Vienna, March 20th, 1815:[2] but on the return of Napoleon from the island of Elba, the allied powers invited the Confederation to accede to the general coalition against France. In the official note delivered by their ministers to the Diet at Zurich, on the 6th of May, 1815, it was stated, that although the allied powers expected that Switzerland would not hesitate to unite with them in accomplishing the common object of alliance, which was to prevent the reëstablishment of the usurped revolutionary authority in France, yet they were far from proposing to Switzerland the development of a military force disproportioned to her resources and to the usages of her people. They respected the military system of a nation, which, uninfluenced by the spirit of ambition, armed for the single purpose of defending its independence and its tranquillity. The allied powers well knew the importance attached by Switzerland to the maintenance of the principle of her neutrality; and it was not with the purpose of violating this principle, but with the view of accelerating the epoch when it might become applicable in an advantageous and permanent manner, that they proposed to the Confederation to assume an attitude and to adopt energetic measures, proportioned to the extraordinary circumstances of the moment without at the same time forming a rule for the future.[3]

In the answer of the Diet to this note, dated the 12th May, 1815, it was declared, that the relations which Switzerland maintained with the allied powers, and with them only, could leave

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[1] Schoell, Histoire des Traités de Paix, tom. ii. ch. 33, p. 339.

[2] Wheaton's Hist. Law of Nations, p. 493.

[3] Martens, Nouveau Recueil, tom. ii. p. 166.

no doubt as to her views and intentions. She would persist in them with that constancy and fidelity which had at all times distinguished the Swiss character. Twenty-two small republics, united together for their security and the maintenance of their independence, must seek for their national strength in the principle of their Confederation. This resulted inevitably from the nature of things, the geographical position, the constitution, and the character of the Swiss people. A consequence of this principle was the neutrality of Switzerland, recognized as the basis of its future relations with all other States. It followed from the same principle, that the most efficacious participation of Switzerland in the great struggle which was about to take place, must necessarily consist in the defence of her frontiers. In adopting this course, she did not separate herself from the common cause of the allied powers, which thus became her own national cause. The defence of a frontier fifty leagues in length, serving as a *point d'appui* for the movements of two armies, was in itself a coöperation not only real, but also of the highest importance. More than thirty thousand men had already been levied for this purpose. Determined to maintain this development of her forces, Switzerland had a right to expect from the favorable disposition of the allied powers, that, so long as she did not claim their assistance, their armies would respect the integrity of her territory. Assurances to this effect on their part were absolutely necessary in order to tranquilize the Swiss people, and engage them to support with fortitude the burthen of an armament so considerable.[1]

On the 20th of May, 1815, a convention was concluded at Zurich, to regulate the accession of Switzerland to the general alliance between Austria, Great Britain, Prussia, and Russia; by which the allied powers stipulated, that, in case of urgency, where the common interest rendered necessary a temporary passage across any part of the Swiss territory, recourse should be had to the authority of the Diet for that purpose. The left wing of the allied army accordingly passed the Rhine between Basle and Rheinfelden, and entered France through the territory of Switzerland.[2]

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[1] Martens, tom. ii. p. 170. [2] Ibid.

On the reëstablishment of the general peace, a declaration was signed at Paris, on the 20th November, 1815, by the four allied powers and France, by which these five powers formally recognized the perpetual neutrality of Switzerland, and guaranteed the integrity and inviolability of her territory within its new limits, as established by the final act of the Congress of Vienna, and by the treaty of Paris of the above date. They also declared that the neutrality and inviolability of Switzerland, and her independence of all foreign influence, were conformable to the true interests of the policy of all Europe, and that no influence unfavorable to the rights of Switzerland, in respect to her neutrality, ought to be drawn from the circumstances which had led to the passage of a part of the allied forces across the Helvetic territory. This passage, freely granted by the cantons in the convention of the 20th May, was the necessary result of the entire adherence of Switzerland to the principles manifested by the allied powers in the treaty of alliance of the 25th March.[1]

Neutrality of Belgium.

2. The geographical position of Belgium, forming a natural barrier between France on the one side, and Germany and Holland on the other, would seem to render the independence and neutrality of the first mentioned country as essential to the preservation of peace between the latter powers, as is that of Switzerland to its maintenance between France and Austria. Belgium covers the most vulnerable point of the northern frontier of France against invasion from Prussia, whilst it protects the entrance of Germany against the armies of France, on a frontier less strongly fortified than that of the Rhine from Basle to Mayence. But so long as the low countries belonged to the house of Austria, either of the Spanish or the German branch, these provinces had been, for successive ages, the battle-ground on which the great contending powers of Europe struggled for the supremacy. The security of the independence of Holland against the encroachments of France was provided for by the barrier-treaties concluded at Utrecht, in 1713, and at Antwerp, in 1715, between Austria, Great Britain, and Holland, by which the fortified towns on the southern frontier of the Austrian Netherlands were to be permanently garrisoned with Dutch troops. The

[1] Martens, tom. iv. p. 186.

kingdom of the Netherlands was created by the Congress of Vienna, in 1815, for the purpose of forming a barrier for Germany against France; and on the dissolution of that kingdom into its original component parts, the perpetual neutrality of Belgium was guaranteed by the five great European powers, and made an essential condition of the recognition of her independence, in the treaties for the separation of Belgium from Holland.[1]

Neutrality of Cracow.

3. We have already seen that by the final act of the Congress of Vienna, 1815, art. 6, the city of Cracow, with its territory, is declared to be a perpetually free, independent, and neutral State, under the joint protection of Austria, Prussia, and Russia.[2] The neutrality, thus created by special compact and guaranteed by the three protecting powers, is made dependent upon the reciprocal obligation of the city of Cracow not to afford an asylum, or protection, to fugitives from justice, or military deserters belonging to the territories of those powers. How far the neutrality of the free and independent State thus created has been actually respected by the protecting powers, or how far the successive temporary occupations of its territory by their military forces, and how far their repeated forcible interference in its internal affairs, may have been justified by the non-fulfilment of the above obligation on the part of Cracow, or by other circumstances authorizing such interference according to the general principles of international law, are questions which have given rise to diplomatic discussions between the great European powers, contracting parties to the treaties of Vienna, but which are foreign to the present object.[3]

The permanent neutrality of Switzerland, Belgium, and Cracow, has thus been solemnly recognized as part of the public law of Europe. But the conventional neutrality thus created differs essentially from that natural or perfect neutrality which every State has a right to observe, independent of special compact, in respect to the wars in which other States may be engaged. The consequences of the latter species of neutrality only arise in case

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[1] Wheaton, Hist. Law of Nations, p. 552.

[2] Vide supra, Pt. I. ch. 2, § 13, p. 46.

[3] Wheaton's Hist. of Law of Nations, pp. 441–445.

of hostilities. It does not exist in time of peace, during which the State is at liberty to contract any eventual engagements it thinks fit as to political relations with other States. A permanently neutral State, on the other hand, by accepting this condition of its political existence, is bound to avoid in time of peace every engagement which might prevent its observing the duties of neutrality in time of war. As an independent State, it may lawfully exercise, in its intercourse with other States, all the attributes of external sovereignty. It may form treaties of amity, and even of alliance with other States; provided it does not thereby incur obligations, which, though perfectly lawful in time of peace, would prevent its fulfilling the duties of neutrality in time of war. Under this distinction, treaties of offensive alliance, applicable to a specific case of war between any two or more powers, or guaranteeing their possessions, are of course interdicted to the permanently neutral State. But this interdiction does not extend to defensive alliances formed with other neutral States for the maintenance of the neutrality of the contracting parties against any power by which it might be threatened with violation.[1]

The question remains, whether this restriction on the sovereign power of the permanently neutral State is confined to political alliances and guarantees, or whether it extends to treaties of commerce and navigation with other States. Here it again becomes necessary to distinguish between the two cases of natural and perfect, or qualified and conventional neutrality. In the case of ordinary neutrality, the neutral State is at liberty to regulate its commercial relations with other States according to its own view of its national interests, provided this liberty be not exercised so as to affect that impartiality which the neutral is bound to observe towards the respective belligerent powers. Vattel states, that the impartiality which a neutral nation is bound to observe, relates solely to the war. "In whatever does not relate to the war, a neutral and impartial nation will not refuse to one of the belligerent parties, on account of its present quarrel, what it grants to the other. This does not deprive the neutral of the liberty of making the advantage of the State the

[1] Arendt, Essai sur la Neutralité de la Belgique, pp. 87–95.

rule of its conduct in its negotiations, its friendly connections, and its commerce. When this reason induces it to give preferences in things which are at the free disposal of the possessor, the neutral nation only makes use of its right, and is not chargeable with partiality. But to refuse any of these things to one of the belligerent parties, merely because he is not at war with the other, and in order to favor the latter, would be departing from the line of strict neutrality."[1]

These general principles must be modified in their application to a permanently neutral State. The liberty of regulating its commercial relations with other foreign States, according to its own views of its national interests, which is an essential attribute of national independence, does not authorize the permanently neutral State to contract obligations in time of peace inconsistent with its peculiar duties in time of war.

§ 5. Neutrality modified by a limited alliance with one of the belligerent parties.

Neutrality may also be modified by antecedent engagements, by which the neutral is bound to one of the parties to the war. Thus the neutral may be bound by treaty, previous to the war, to furnish one of the belligerent parties with a limited succor in money, troops, ships, or munitions of war, or to open his ports to the armed vessels of his ally, with their prizes. The fulfilment of such an obligation does not necessarily forfeit his neutral character, nor render him the enemy of the other belligerent nation, because it does not render him the general associate of its enemy.[2]

How far a neutrality, thus limited, may be tolerated by the opposite belligerent, must often depend more upon considerations of policy than of strict right. Thus, where Denmark, in consequence of a previous treaty of defensive alliance, furnished limited succors in ships and troops to the Empress Catharine II. of Russia, in the war of 1788 against Sweden, the abstract right of the Danish court to remain neutral, except so far as regarded

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[1] Vattel, Droit des Gens, liv. iii. ch. 7, § 104.

[2] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. ix. Vattel, Droit des Gens, liv. iii. ch. 6, §§ 101–105. As to the general principles to be applied to such treaties, and when the *casus fœderis* arises, vide supra, Pt. III. ch. 2, §§ 14, 15, p. 346.

the stipulated succors, was scarcely contested by Sweden and the allied mediating powers. But it is evident, from the history of these transactions, that if the war had continued, the neutrality of Denmark would not have been tolerated by these powers, unless she had withheld from her ally the succors stipulated by the treaty of 1773, or Russia had consented to dispense with its fulfilment.[1]

§ 6. Qualified neutrality, arising out of antecedent treaty stipulations, admitting the armed vessels and prizes of one belligerent into the neutral ports, whilst those of the other are excluded.

Another case of qualified neutrality arises out of treaty stipulations antecedent to the commencement of hostilities, by which the neutral may be bound to admit the vessels of war of one of the belligerent parties, with their prizes, into his ports, whilst those of the other may be entirely excluded, or only admitted under limitations and restrictions. Thus, by the treaty of amity and commerce of 1778, between the United States and France, the latter secured to herself two special privileges in the American ports: — 1. Admission for her privateers, with their prizes, to the exclusion of her enemies. 2. Admission for her public ships of war, in case of urgent necessity, to refresh, victual, repair, &c., but not exclusively of other nations at war with her. Under these stipulations, the United States not being expressly bound to exclude the public ships of the enemies of France, granted an asylum to British vessels and those of other powers at war with her. Great Britain and Holland still complained of the exclusive privileges allowed to France in respect to her privateers and prizes, whilst France herself was not satisfied with the interpretation of the treaty by which the public ships of her enemies were admitted into the American ports. To the former, it was answered by the American government, that they enjoyed a perfect equality, qualified only by the exclusive admission of the privateers and prizes of France, which was the effect of a treaty made long before, for valuable considerations, not with a view to circumstances such as had occurred in the war of the French Revolution, nor against

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[1] Annual Register, vol. xxx. pp. 181, 182. State Papers, p. 292. Eggers, Leben Von Bernstorf, 2 abtheil, pp. 118–195.

any nation in particular, but against all nations in general, and which might, therefore, be observed without giving just offence to any.[1]

On the other hand, the minister of France asserted the right of arming and equipping vessels for war, and of enlisting men, within the neutral territory of the United States. Examining this question under the law of nations and the general usage of mankind, the American government produced proofs, from the most enlightened and approved writers on the subject, that a neutral nation must, in respect to the war, observe an exact impartiality towards the belligerent parties; that favors to the one, to the prejudice of the other, would import a fraudulent neutrality, of which no nation would be the dupe; that no succor ought to be given to either, unless stipulated by treaty, in men, arms, or any thing else, directly serving for war; that the right of raising troops being one of the rights of sovereignty, and consequently appertaining exclusively to the nation itself, no foreign power can levy men within the territory without its consent; that, finally, the Treaty of 1778, making it unlawful for the enemies of France to arm in the United States, could not be construed affirmatively into a permission to the French to arm in those ports, the treaty being express as to the prohibition, but silent as to the permission.[2]

§ 7. Hostilities within the territory of the neutral State.

The rights of war can be exercised only within the territory of the belligerent powers, upon the high seas, or in a territory belonging to no one. Hence it follows, that hostilities cannot lawfully be exercised within the territorial jurisdiction of the neutral State, which is the common friend of both parties.[3]

§ 8. Passage through the

This exemption extends to the passage of an army or fleet through the limits of the territorial jurisdiction,

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[1] Mr. Jefferson's Letter to Mr. Hammond and Mr. Van Berckel, Sept. 9, 1793. Waite's State Papers, vol. i. pp. 169, 172.

[2] Mr. Jefferson's Letter to Mr. G. Morris, Aug. 16, 1793. Waite's State Papers, vol. i. p. 140.

[3] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 8. Martens, des Prises et Reprises, ch. 2, § 18.

neutral territory.

which can hardly be considered an innocent passage, such as one nation has a right to demand from another; and, even if it were such an innocent passage, is one of those *imperfect* rights, the exercise of which depends upon the consent of the proprietor, and which cannot be compelled against his will. It may be granted or withheld, at the discretion of the neutral State; but its being granted is no ground of complaint on the part of the other belligerent power, provided the same privilege is granted to him, unless there be sufficient reasons for withholding it.[1]

The extent of the maritime territorial jurisdiction of every State bordering on the sea has already been described.[2]

§ 9. Captures within the maritime territorial jurisdiction, or by vessels stationed within it, or hovering on the coasts.

Not only are all captures made by the belligerent cruisers within the limits of this jurisdiction absolutely illegal and void, but captures made by armed vessels stationed in a bay or river, or in the mouth of a river, or in the harbor of a neutral State, for the purpose of exercising the rights of war from this station, are also invalid. Thus, where a British privateer stationed itself within the river Mississippi, in the neutral territory of the United States, for the purpose of exercising the rights of war from the river, by standing off and on, obtaining information at the Balize, and overhauling vessels in their course down the river, and made the capture in question within three English miles of the alluvial islands formed at its mouth, restitution of the captured vessel was decreed by Sir W. Scott. So, also, where a belligerent ship, lying within neutral territory, made a capture with her boats out of the neutral territory, the capture was held to be invalid; for though the hostile force employed was applied to the captured vessel lying out of the territory, yet no such use of a neutral territory for the purposes of war is to be permitted. This prohibition is not to be extended to *remote* uses, such as procuring provisions and refreshments, which the law of nations universally tolerates; but no *proximate* acts of

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[1] Vide ante, Pt. II. ch. 4, § 12, p. 253. Vattel, Droit des Gens, liv. iii. ch. 7, §§ 119–131. Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 2, § 13. Sir W. Scott, Robinson's Adm. Rep. vol. iii. p. 353.

[2] Vide ante, Pt. II. ch. 4, §§ 6–8, pp. 233–236.

war are in any manner to be allowed to originate on neutral ground.[1]

§ 10. Vessels chased into the neutral territory, and there captured.

Although the immunity of the neutral territory from the exercise of any act of hostility is generally admitted, yet an exception to it has been attempted to be raised in the case of a hostile vessel met on the high seas and pursued; which it is said may, in the pursuit, be chased within the limits of a neutral territory. The only text writer of authority who has maintained this anomalous principle is Bynkershoek.[2] He admits that he had never seen it mentioned in the writings of the public jurists, or among any of the European nations, the Dutch only excepted; thus leaving the inference open, that even if reasonable in itself, such a practice never rested upon authority, nor was sanctioned by general usage. The extreme caution, too, with which he guards this license to belligerents, can hardly be reconciled with the practical exercise of it; for how is an enemy to be pursued in a hostile manner within the jurisdiction of a friendly power, without imminent danger of injuring the subjects and property of the latter? *Dum fervet opus* — in the heat and animation excited against the flying foe, there is too much reason to presume that little regard will be paid to the consequences that may ensue to the neutral. There is, then, no exception to the rule, that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful. "When the fact is established," says Sir W. Scott, "it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy."[3] (*a*)

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[1] The Anna, Nov. 1805. Robinson's Adm. Rep. vol. v. p. 373. The Twee Gebroeders, July, 1800. Vol. iii. p. 162.

[2] Quæst. Jur. Pub. lib. i. cap. 8. This opinion of Bynkershoek, in which Casaregis seems to concur, is reprobated by several other public jurists. Azuni, Diritto Maritimo, Pt. I. c. 4, art. 1. Valin, Traité des Prises, ch. 4, § 3, No. 4, art. 1. D'Habreu, Sobre las Prisas, Pt. I. ch. 4, § 15.

[3] Robinson's Adm. Rep. vol. v. p. 15. The Vrow Anna Catharina.

(*a*) [A case of violation of neutral territory occurred in the destruction, in the harbor of Fayal, in September, 1814, of the American privateer General Armstrong, by an English squadron. Reclamations, founded on it, were made against

§ 11. Claim on the ground of violation of neutral territory must be sanctioned by the neutral State.

Though it is the duty of the captor's country to make restitution of the property thus captured within the territorial jurisdiction of the neutral State, yet it is a technical rule of the prize courts to restore to the individual claimant, in such a case, only on the application of the neutral government whose territory has been thus violated. This rule is founded upon the principle, that the neutral State alone has been injured by the capture, and that the hostile claimant has no right to appear for the purpose of suggesting the invalidity of the capture.[1]

§ 12. Restitution by the neutral State of property captured within its jurisdiction, or

Where a capture of enemy's property is made within neutral territory, or by armaments unlawfully fitted out within the same, it is the right as well as the duty of the neutral State, where the property thus taken comes into its possession, to restore it to the original owners.

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the government of Portugal, which were, by the 2d article of the Treaty of 26th of February, 1851, (Treaties of the United States, 1854, p. 92,) agreed to be submitted to the arbitration of a sovereign, potentate, or chief of some nation in amity with both the high contracting parties. Under this provision, Louis Napoleon, the President of the French Republic, was selected as arbitrator. There is some discrepancy between the American statement and the summary of facts on which the award proceeds. The Prince President, however, in pronouncing that no indemnity was due from Portugal, does not deny the responsibility of a neutral to make compensation to a belligerent, whose property has been captured or destroyed within its jurisdictional limits by the opposing belligerent; but he bases his decision on the assumed fact, that the American commander had not applied, from the beginning, for the intervention of the neutral sovereign; that by having recourse to arms, to repel an unjust aggression of which he pretended to be the object, he had himself failed to respect the neutrality of the territory of the foreign sovereign, and had thereby released that sovereign from the obligation to afford him protection by any other means than that of pacific intervention; and that the Portuguese government could not be held responsible for the result of the collision which took place, in contempt of its rights of sovereignty, and in violation of the neutrality of its territory, and without the local officers being required, in proper time, to grant the necessary aid and protection. Cong. Doc. 32d Cong. 1st Sess. H. Rep. Ex. Doc. No. 53. 32d Cong. 2d Sess. Senate Ex. Doc. No. 24. See Rev. Étr. et Fr. tom. vii. p. 751, for the case of the French ships of war captured by the British in 1759, within the jurisdiction of Portugal, and restored on the demand of the Marquis Pomballos.]

[1] Robinson's Adm. Rep. vol. iii. Note. Case of the Etrusco. Wheaton's Rep. vol. iii. p. 447. The Anne.

This restitution is generally made through the agency of the courts of admiralty and maritime jurisdiction. Traces of the exercise of such a jurisdiction are found at a very early period in the writings of Sir Leoline Jenkins, who was Judge of the English High Court of Admiralty in the reigns of Charles II. and James II. In a letter to the king in council, dated October 11, 1675, relating to a French privateer seized at Harwich with her prize, (a Hamburg vessel bound to London,) Sir Leoline states several questions arising in the case, among which was, "Whether this Hamburger, being taken within one of your Majesty's chambers, and being bound for one of your ports, ought not to be set free by your Majesty's authority, notwithstanding he were, if taken upon the high seas out of those chambers, a lawful prize. I do humbly conceive he ought to be set free, upon a full and clear proof that he was within one of the king's chambers at the time of the seizure, which he, in his first memorial, sets forth to have been eight leagues at sea, over against Harwich. King James (of blessed memory) his direction, by proclamation, March 2, 1604, being that all officers and subjects, by sea and land, shall rescue and succor all merchants and others, as shall fall within the danger of such as shall await the coasts, in so near places to the hinderance of trade outward and homeward; and all foreign ships, when they are within the king's chambers, being understood to be within the places intended in those directions, must be in safety and indemnity, or else when they are surprised must be restored to it, otherwise they have not the protection worthy of your Majesty, and of the ancient reputation of those places. But this being a point not lately settled by any determination, (that I know of, in case where the king's chambers precisely, and under that name, came in question,) is of that importance as to deserve your Majesty's declaration and assertion of that right of the crown by an act of State in council, your Majesty's coasts being now so much infested with foreign men of war, that there will be frequent use of such a decision."[1]

otherwise in violation of its neutrality.

Captures within the places called the *King's Chambers.*

Whatever doubts there may be as to the extent of the territorial jurisdiction thus asserted, as entitled to the neutral immu-

[1] Life and Works of Sir L. Jenkins, vol. ii. p. 727.

nity, there can be none as to the sense entertained by this eminent civilian respecting the right and the duty of the neutral sovereign to make restitution where his territory is violated.

Extent of the neutral jurisdiction along the coasts and within the bays and rivers.

When the maritime war commenced in Europe, in 1793, the American government, which had determined to remain neutral, found it necessary to define the extent of the line of territorial protection claimed by the United States on their coasts, for the purpose of giving effect to their neutral rights and duties. It was stated on this occasion, that governments and writers on public law had been much divided in opinion as to the distance from the seacoast within which a neutral nation might reasonably claim a right to prohibit the exercise of hostilities. The character of the coast of the United States, remarkable in considerable parts of it for admitting no vessel of size to pass near the shore, it was thought would entitle them in reason to as broad a margin of protected navigation as any nation whatever. The government, however, did not propose, at that time, and without amicable communications with the foreign powers interested in that navigation, to fix on the distance to which they might ultimately insist on the right of protection. President Washington gave instructions to the executive officers to consider it as restrained, for the present, to the distance of one sea league, or three geographical miles, from the sea-shores. This distance, it was supposed, could admit of no opposition, being recognized by treaties between the United States, and some of the powers with whom they were connected in commercial intercourse, and not being more extensive than was claimed by any of them on their own coasts. As to the bays and rivers, they had always been considered as portions of the territory, both under the laws of the former colonial government and of the present union, and their immunity from belligerent operations was sanctioned by the general law and usage of nations. The 25th article of the treaty of 1794, between Great Britain and the United States, stipulated that "neither of the said parties shall permit the ships or goods belonging to the citizens or subjects of the other, to be taken within cannon shot of the coast, nor in any of the bays, ports, or rivers, of their territories, by ships of war, or others, having commissions from any prince, republic, or State whatever. But in case it should so happen, the party whose territorial rights shall thus have been

violated, shall use his utmost endeavors to obtain from the offending party full and ample satisfaction for the vessel or vessels so taken, whether the same be vessels of war or merchant vessels." Previously to this treaty with Great Britain, the United States were bound by treaties with three of the belligerent nations, (France, Prussia, and Holland,) to protect and defend, "by all the means in their power," the vessels and effects of those nations in their ports or waters, or on the seas near their shores, and to recover and restore the same to the right owner when taken from them. But they were not bound to make compensation if *all the means in their power* were used, and failed in their effect. Though they had, when the war commenced, no similar treaty with Great Britain, it was the President's opinion that they should apply to that nation the same rule which, under this article, was to govern the others abovementioned; and even extend it to captures made on the high seas, and brought into the American ports, if made by vessels which had been armed within them. In the constitutional arrangement of the different authorities of the American Federal Union, doubts were at first entertained whether it belonged to the executive government, or the judiciary department, to perform the duty of inquiring into captures made within the neutral territory, or by armed vessels originally equipped or the force of which had been augmented within the same, and of making restitution to the injured party. But it has been long since settled that this duty appropriately belongs to the federal tribunals, acting as courts of admiralty and maritime jurisdiction.[1]

§ 13. Limitations of the neutral jurisdiction to restore in cases of illegal capture.

It has been judicially determined that this peculiar jurisdiction to inquire into the validity of captures made in violation of the neutral immunity, will be exercised only for the purpose of restoring the specific property, when voluntarily brought within the territory, and does not extend to the infliction of vindictive damages, as in ordinary

[1] Mr. Jefferson's Letter to M. Genet, Nov. 8, 1793. Waite's State Papers, vol. vi. p. 195. Opinion of the Attorney-General on the capture of the British ship Grange, May 14, 1793. Ibid. vol. i. p. 75. Mr. Jefferson's Letter to Mr. Hammond, Sept. 5, 1793. Waite's State Papers, vol. i. p. 165. Wheaton's Reports, vol. iv. p. 65, Note *a*.

cases of maritime injuries. And it seems to be doubtful whether this jurisdiction will be exercised where the property has been once carried *infra præsidia* of the captor's country, and there regularly condemned in a competent court of prize. However this may be in cases where the property has come into the hands of a *bonâ fide* purchaser, without notice of the unlawfulness of the capture, it has been determined that the neutral court of admiralty will restore it to the original owner, where it is found in the hands of the captor himself, claiming under the sentence of condemnation. But the illegal equipment will not affect the validity of a capture, made after the cruise to which the outfit had been applied, is actually terminated.[1]

§ 14. Right of asylum in neutral ports dependent on the consent of the neutral State.

An opinion is expressed by some text writers, that belligerent cruisers, not only are entitled to seek an asylum and hospitality in neutral ports, but have a right to bring in and sell their prizes within those ports. But there seems to be nothing in the established principles of public law which can prevent the neutral State from withholding the exercise of this privilege impartially from all the belligerent powers; or even from granting it to one of them, and refusing it to others, where stipulated by treaties existing previous to the war. The usage of nations, as testified in their marine ordinances, sufficiently shows that this is a rightful exercise of the sovereign authority which every State possesses, to regulate the police of its own sea-ports, and to preserve the public peace within its own territory. But the absence of a positive prohibition implies a permission to enter the neutral ports for these purposes.[2]

§ 15. Neutral impartiality, in what it consists.

Vattel states that the impartiality, which a neutral nation ought to observe between the belligerent parties, consists of two points. 1. To give no assistance where there is no previous stipulation to give it; nor voluntarily to furnish troops, arms, ammunition, or any thing of direct

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1 Wheaton's Rep. vol. v. p. 385. The Amistad de Rues, vol. viii. p. 108. La Nereyda, vol. ix. p. 658. The Fanny, vol. vii. p. 519. The Arrogante Barcelones. Ibid. p. 283. The Santissima Trinidad.

2 Bynkershoek, Quæss. Jur. Pub. lib. i. cap. 15. Vattel, liv. iii. ch. 7, § 132. Valin, Comm. sur l'Ordonn. de la Marine, tom. ii. p. 272.

use in war. "I do not say *to give assistance equally*, but *to give no assistance:* for it would be absurd that a State should assist at the same time two enemies. And besides, it would be impossible to do it with equality: the same things, the like number of troops, the like quantity of arms, of munitions, &c., furnished under different circumstances, are no longer equivalent succors. 2. In whatever does not relate to the war, the neutral must not refuse to one of the parties, merely because he is at war with the other, what she grants to that other."[1]

§ 16. Arming and equipping vessels, and enlisting men within the neutral territory, by either belligerent, unlawful.

These principles were appealed to by the American government, when its neutrality was attempted to be violated on the commencement of the European war, in 1793, by arming and equipping vessels, and enlisting men within the ports of the United States, by the respective belligerent powers, to cruise against each other. It was stated that if the neutral power might not, consistently with its neutrality, furnish men to either party for their aid in war, as little could either enrol them in the neutral territory. The authority both of Wolfius and Vattel was appealed to in order to show, that the levying of troops is an exclusive prerogative of sovereignty, which no foreign power can lawfully exercise within the territory of another State, without its express permission. The testimony of these and other writers on the law and usage of nations was sufficient to show, that the United States, in prohibiting all the belligerent powers from equipping, arming, and manning vessels of war in their ports, had exercised a right and a duty with justice and moderation. By their treaties with several of the belligerent powers, treaties forming part of the law of the land, they had established a state of peace with them. But without appealing to treaties, they were at peace with them all by the law of nature; for, by the natural law, man is at peace with man, till some aggression is committed, which by the same law authorizes one to destroy another, as his enemy. For the citizens of the United States, then, to commit murders and depredations on the members of other nations, or to combine to do it, appeared to the American

[1] Droit des Gens, liv. iii. ch. 7, § 104.

government as much against the laws of the land as to murder or rob, or combine to murder or rob, their own citizens; and as much to require punishment, if done within their limits, where they had a territorial jurisdiction, or, on the high seas, where they had a personal jurisdiction, that is to say, one which reached their own citizens only; this being an appropriate part of each nation, on an element where each has a common jurisdiction.[1]

§ 17. Prohibition enforced by municipal statutes.

The same principles were afterwards incorporated in a law of Congress passed in 1794, and revised and reënacted in 1818, by which it is declared to be a misdemeanor for any person, within the jurisdiction of the United States, to augment the force of any armed vessel, belonging to one foreign power at war with another power, with whom they are at peace; or to prepare any military expedition against the territories of any foreign nation with whom they are at peace; or to hire or enlist troops or seamen for foreign military or naval service; or to be concerned in fitting out any vessel, to cruise or commit hostilities in foreign service, against a nation at peace with them: and the vessel, in this latter case, is made subject to forfeiture. The President is also authorized to employ force to compel any foreign vessel to depart, which by the law of nations or treaties ought not to remain within the United States, and to employ generally the public force in enforcing the duties of neutrality prescribed by the law.[2]

Foreign Enlistment Act.

The example of America was soon followed by Great Britain, in the act of Parliament 59 Geo. III. ch. 69, entitled, "An act to prevent the Enlisting or Engagement of His Majesty's Subjects to serve in foreign Service, and the Fitting out or Equipping in His Majesty's Dominions Vessels for warlike purposes, without His Majesty's License." The previous statutes, 9 and 29 Geo. II., enacted for the purpose of preventing the formation of Jacobite armies in France and Spain, annexed capital punishment as for a felony, to the offence of entering the service of a foreign State. The 59 Geo. III. ch. 69,

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[1] Mr. Jefferson's Letter to M. Genet, June 17, 1793. American State Papers, vol. i. p. 155.

[2] Kent's Comm. on American Law, vol. i. p. 123. 5th ed.

commonly called the Foreign Enlistment Act, provided a less severe punishment, and also supplied a defect in the former law, by introducing after the words "king, prince, state, or potentate," the words "colony or district assuming the powers of a government," in order to reach the case of those who entered the service of unacknowledged as well as of acknowledged States. The act also provided for preventing and punishing the offence of fitting out armed vessels, or supplying them with warlike stores, upon which the former law had been entirely silent.

In the debates which took place in Parliament upon the enactment of the last-mentioned act in 1819, and on the motion for its repeal in 1823, it was not denied by Sir J. Mackintosh and other members who opposed the bill, that the sovereign power of every State might interfere to prevent its subjects from engaging in the wars of other States, by which its own peace might be endangered, or its political and commercial interests affected. It was, however, insisted that the principles of neutrality only required the British legislature to maintain the laws in being, but could not command it to change any law, and least of all to alter the existing laws for the evident advantage of one of the belligerent parties. Those who assisted insurgent States, however meritorious the cause in which they were engaged, were in a much worse situation than those who assisted recognized governments, as they could not lawfully be reclaimed as prisoners of war, and might, as engaged in what was called rebellion, be treated as rebels. The proposed new law would go to alter the relative risks, and operate as a law of favor to one of the belligerent parties. To this argument it was replied by Mr. Canning, that when peace was concluded between Great Britain and Spain in 1814, an article was introduced into the treaty by which the former power stipulated not to furnish any succors to what were then denominated the revolted colonies of Spain. In process of time, as those colonies became more powerful, a question arose of a very difficult nature, to be decided on a due consideration of their *de jure* relation to Spain on the one hand, and their *de facto* independence on the other. The law of nations afforded no precise rule as to the course which, under circumstances so peculiar as the transition of colonies from their allegiance to the parent State, ought to be pursued by foreign powers. It was difficult to know how far the statute law or the common law was appli-

cable to colonies so situated. It became necessary, therefore, in the act of 1819, to treat the colonies as actually independent of Spain; and to prohibit mutually, and with respect to both, the aid which had been hitherto prohibited with respect to one only. It was in order to give full and impartial effect to the provisions of the treaty with Spain, which prohibited the exportation of arms and ammunition to the colonies, but did not prohibit their exportation to Spain, that the act of Parliament declared that the prohibition should be mutual. When, however, from the tide of events flowing from the proceedings of the Congress of Verona, war became probable between France and Spain, it became necessary to review these relations. It was obvious that if war actually broke out, the British government must either extend to France the prohibition which already existed with respect to Spain, or remove from Spain the prohibition to which she was then subject, provided they meant to place the two countries on an equal footing. So far as the exportation of arms and ammunition was concerned, it was in the power of the crown to remove any inequality between the belligerent parties, simply by an order in council. Such an order was consequently issued, and the prohibition of exporting arms and ammunition to Spain was removed. By this measure the British government offered a guarantee of their *bonâ fide* neutrality. The mere appearance of neutrality might have been preserved by the extension of the prohibition to France, instead of the removal of the prohibition from Spain: but it would have been a prohibition of words only, and not at all in fact; for the immediate vicinity of the Belgic ports to France would have rendered the prohibition of direct exportation to France totally nugatory. The repeal of the act of 1819 would have, not the same, but a correspondent effect to that which would have been produced by an order in council prohibiting the exportation of arms and ammunition to France. It would be a repeal in words only as respects France, but in fact respecting Spain; and would occasion an inequality of operation in favor of Spain, inconsistent with an impartial neutrality. The example of the American government was referred to, as vindicating the justice and policy of preventing the subjects of a neutral country from enlisting in the service of any belligerent power, and of prohibiting the equipment in its ports of armaments in aid of such power. Such was the conduct of that government under the

presidency of Washington, and the secretaryship of Jefferson; and such was more recently the conduct of the American legislature in revising their neutrality statutes in 1818, when the Congress extended the provisions of the act of 1794 to the case of such unacknowledged States as the South American colonies of Spain, which had not been provided for in the original law.[1]

§ 18. Immunity of the neutral territory, how far it extends to neutral vessels on the high seas.

The unlawfulness of belligerent captures, made within the territorial jurisdiction of a neutral State, is incontestably established on principle, usage, and authority. Does this immunity of the neutral territory from the exercise of acts of hostility within its limits, extend to the vessels of the nation on the high seas, and without the jurisdiction of any other State?

We have already seen, that both the public and private vessels of every independent nation on the high seas, and without the territorial limits of any other State, are subject to the municipal jurisdiction of the State to which they belong.[2] This jurisdiction is exclusive, only so far as respects offences against the municipal laws of the State to which the vessel belongs. It excludes the exercise of the jurisdiction of every other State under its municipal laws, but it does not exclude the exercise of the jurisdiction of other nations, as to crimes under international law; such as piracy, and other offences, which all nations have an equal right to judge and to punish. Does it, then, exclude the exercise of the belligerent right of capturing enemy's property?

This right of capture is confessedly such a right as may be exercised within the territory of the belligerent State, within the enemy's territory, or in a place belonging to no one; in short, in any place except the territory of a neutral State. Is the vessel of a neutral nation on the high seas such a place?

Distinction between public and private vessels.

A distinction has been here taken between the public and the private vessels of a nation. In respect to its *public* vessels, it is universally admitted, that neither the

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[1] Annual Register, vol. lxi. p. 71. Canning's Speeches, vol. iv. p. 150; vol. v. p. 34.

[2] Vide ante, Pt. II. ch. 2, § 10, p. 158.

right of visitation and search, of capture, nor any other belligerent right, can be exercised on board such a vessel on the high seas. A public vessel, belonging to an independent sovereign, is exempt from every species of visitation and search, even within the territorial jurisdiction of another State; *à fortiori*, must it be exempt from the exercise of belligerent rights on the ocean, which belongs exclusively to no one nation?[1]

In respect to *private* vessels, it has been said the case is different. They form no part of the neutral territory, and, when within the territory of another State, are not exempt from the local jurisdiction. That portion of the ocean which is temporarily occupied by them forms no part of the neutral territory; nor does the vessel itself, which is a movable thing, the property of private individuals, form any part of the territory of that power to whose subjects it belongs. The jurisdiction which that power may lawfully exercise over the vessel on the high seas, is a jurisdiction over the persons and property of its citizens; it is not a territorial jurisdiction. Being upon the ocean, it is a place where no particular nation has jurisdiction; and where, consequently, all nations may equally exercise their international rights.[2]

§ 19. Usage of nations subjecting enemy's goods in neutral vessels to capture.

Whatever may be the true original abstract principle of natural law on this subject, it is undeniable that the constant usage and practice of belligerent nations, from the earliest times, have subjected enemy's goods in neutral vessels to capture and condemnation, as prize of war. This constant and universal usage has only been interrupted by treaty stipulations, forming a temporary conventional law between the parties to such stipulations.[3]

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[1] Vide ante, Pt. II. ch. 2, § 10, p. 158.

[2] Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 19. Azuni, Diritto Maritimo, Pt. II. ch. 3, art. 2. Letter of American Envoys at Paris to M. de Talleyrand, January, 1798. Waite's American State Papers, vol. iv. p. 34.

[3] Consolato del Mare, cap. 273. Wheaton's Hist. Law of Nations, pp. 65, 115–119, 200–206. Albericus Gentilis, Hisp. Advoc. lib. i. cap. 27. Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, §§ 6, 26; cap. 1, § 5, Note 6. Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 14. Vattel, Droit des Gens, liv. iii. ch. 7, § 115, Heineccius, de Nav. ob. vect. cap. 2, § 9. Loccenius, de Jure Marit. lib. ii. cap. 4. § 12. Azuni, Diritto Marit. Pt. II. ch. 3, art. 1, 2.

§ 20. Neutral vessels laden with enemy goods subject to confiscation by the ordinances of some States.

The regulations and practice of certain maritime nations, at different periods, have not only considered the *goods* of an enemy, laden in the ships of a friend, liable to capture, but have doomed to confiscation the neutral *vessel* on board of which these goods were laden. This practice has been sought to be justified, upon a supposed analogy with that provision of the Roman law, which involved the vehicle of prohibited commodities in the confiscation pronounced against the prohibited goods themselves.[1]

Thus, by the marine ordinance of Louis XIV., of 1681, all vessels laden with enemy's goods are declared lawful prize of war. The contrary rule had been adopted by the preceding prize ordinances of France, and was again revived by the règlement of 1744, by which it was declared, that "in case there should be found on board of neutral vessels, of whatever nation, goods or effects belonging to his Majesty's enemies, the goods or effects shall be good prize, and the vessel shall be restored." Valin, in his commentary upon the ordinance, admits that the more rigid rule, which continued to prevail in the French prize tribunals from 1681 to 1744, was peculiar to the jurisprudence of France and Spain; but that the usage of other nations was only to confiscate the goods of the enemy.[2]

§ 21. Goods of a friend on board the ships of an enemy, liable to confiscation by the prize codes of some nations.

Although by the general usage of nations, independently of treaty stipulations, the goods of an enemy, found on board the ships of a friend, are liable to capture and condemnation, yet the converse rule, which subjects to confiscation the goods of a friend, on board the vessels of an enemy, is manifestly contrary to reason and justice. It may, indeed, afford, as Grotius has stated, a presumption that the goods are enemy's property; but it is such a presumption as will readily yield to contrary proof, and not of that class of presumptions which the civilians call *presumptiones juris et de jure*, and which are conclusive upon the party.

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1 Barbeyrac, Note to Grotius, lib. iii. cap. 6, § 6, Note 1.

2 Valin, Comm. liv. iii. tit. 9. Des Prises, art. 7. Wheaton's Hist. Law of Nations, pp. 111–114.

But however unreasonable and unjust this maxim may be, it has been incorporated into the prize codes of certain nations, and enforced by them at different periods. Thus, by the French ordinances of 1538, 1543, and 1584, the goods of a friend, laden on board the ships of an enemy, are declared good and lawful prize. The contrary was provided by the subsequent declaration of 1650; but by the marine ordinance of Louis XIV., of 1681, the former rule was again established. Valin and Pothier are able to find no better argument in support of this rule, than that those who lade their goods on board an enemy's vessels thereby favor the commerce of the enemy, and by this act are considered in law as submitting themselves to abide the fate of the vessel; and Valin asks, "How can it be that the goods of friends and allies, found in an enemy's ship, should not be liable to confiscation, whilst even those of subjects are liable to it?" To which Pothier himself furnishes the proper answer: that, in respect to goods, the property of the king's subjects, in lading them on board an enemy's vessels they contravene the law which interdicts to them all commercial intercourse with the enemy, and deserve to lose their goods for this violation of the law.[1]

The fallacy of the argument by which this rule is attempted to be supported, consists in assuming, what requires to be proved, that, by the act of lading his goods on board an enemy's vessel, the neutral submits himself to abide the fate of the vessel; for it cannot be pretended that the goods are subjected to capture and confiscation *ex re*, since their character of neutral property exempts them from this liability. Nor can it be shown that they are thus liable *ex delicto*, unless it be first proved that the act of lading them on board is an offence against the law of nations. It is therefore with reason that Bynkershoek concludes that this rule, where merely established by the prize ordinances of a belligerent power, cannot be defended on sound principles. Where, indeed, it is made by special compact the equivalent for the converse maxim, that *free ships make free goods*, this relaxa-

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[1] Valin, Comm. liv. iii. tit. 9. Des Prises, art. 7. Pothier, Traité de Propriété, No. 96.

tion of belligerent pretensions may be fairly coupled with a correspondent concession by the neutral, that *enemy ships should make enemy goods*. These two maxims have been, in fact, commonly thus coupled in the various treaties on this subject, with a view to simplify the judicial inquiries into the proprietary interest of the ship and cargo, by resolving them into the mere question of the national character of the ship.

§ 22. The two maxims, of *free ships free goods* and *enemy ships enemy goods*, not necessarily connected.

The two maxims are not, however, inseparable. The primitive law, independently of international compact, rests on the simple principle, that war gives a right to capture the goods of an enemy, but gives no right to capture the goods of a friend. The right to capture an enemy's property has no limit but of the *place* where the goods are found, which, if neutral, will protect them from capture. We have already seen that a neutral vessel on the high seas is not such a place. The exemption of neutral property from capture has no other exceptions than those arising from the carrying of contraband, breach of blockade, and other analogous cases, where the conduct of the neutral gives to the belligerent a right to treat his property as enemy's property. The neutral flag constitutes no protection to an enemy's property, and the belligerent flag communicates no hostile character to neutral property. States have changed this simple and natural principle of the law of nations, by mutual compact, in whole or in part, according as they believed it to be for their interest; but the one maxim, that *free ships make free goods*, does not necessarily imply the converse proposition, that *enemy ships make enemy goods*. The stipulation, that neutral bottoms shall make neutral goods, is a concession made by the belligerent to the neutral, and gives to the neutral flag a capacity not given to it by the primitive law of nations. On the other hand, the stipulation subjecting neutral property, found in the vessel of an enemy, to confiscation as prize of war, is a concession made by the neutral to the belligerent, and takes from the neutral a privilege he possessed under the preëxisting law of nations; but neither reason nor usage renders the two concessions so indissoluble, that the one cannot exist without the other.

It was upon these grounds that the Supreme Court of the United States determined that the Treaty of 1795, between them

and Spain, which stipulated that free ships should make free goods, did not necessarily imply the converse proposition, that enemy ships should make enemy goods, the treaty being silent as to the latter; and that, consequently, the goods of a Spanish subject, found on board the vessel of an enemy of the United States, were not liable to confiscation as prize of war. And although it was alleged, that the prize law of Spain would subject the property of American citizens to condemnation, when found on board the vessels of her enemy, the court refused to condemn Spanish property, found on board a vessel of their enemy, upon the principle of reciprocity; because the American government had not manifested its will to retaliate upon Spain; and until this will was manifested by some legislative act, the court was bound by the general law of nations constituting a part of the law of the land.[1] (*a*)

§ 23. Conventional law as to *free ships free goods.*

The conventional law, in respect to the rule now in question, has fluctuated at different periods, according to the fluctuating policy and interests of the different maritime States of Europe. It has been much more flexible than the consuetudinary law; but there is a great preponderance of modern treaties in favor of the maxim, *free ships free goods*, sometimes, but not always, connected with the correlative maxim, *enemy ships enemy goods;* so that it may be said that, for two centuries past, there has been a constant tendency to establish, by compact, the principle, that the neutrality of the ship should exempt the cargo, even if enemy's property, from capture and confiscation as prize of war. The capitulation granted by the Ottoman Porte to Henry IV. of France, in 1604, has commonly been supposed to form the earliest example of a relaxation of the primitive rule of the maritime law of nations, as recognized by the Consolato del Mare, by which the goods of an enemy, found

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[1] Cranch's Rep. vol. ix. p. 388. The Nereide.

(*a*) [A late French writer thus distinguishes, in the two cases, the effect of the nationality of the ship on that of the cargo: — "Dans le premier cas, le pavillon ami protège la propriété ennemie, parcequ'il inter dit aux croiseurs l'entrée et par conséquent la visite du bâtiment; dans le second cas, parceque le pavillon n'en dénature point la propriété." Garden, Traité de Diplomatie, tom. ii. p. 365.]

on board the ships of a friend, were liable to capture and confiscation as prize of war. But a more careful examination of this instrument will show, that it was not a reciprocal compact between France and Turkey, intended to establish the more liberal maxim of *free ships free goods;* but was a gratuitous concession, on the part of the Sultan, of a special privilege, by which the goods of French subjects laden on board the vessels of his enemies, and the goods of his enemies laden on board French vessels, were both exempted from capture by Turkish cruisers. The capitulation expressly declares, art. 10: — "Parceque des sujets de la France naviguent sur vaisseaux appartenans à nos ennemis, et les chargent de leurs marchandises, et étant rencontrés, ils sont faits le plus souvent esclaves, et leurs marchandises prises; pour cette cause, nous commandons et voulons qu'à l'avenir, ils ne puissent être pris sous ce prétexte, ni leurs facultés confisquées, à moins qu'ils ne soient trouvés sur vaisseaux en course," etc. Art. 12: — "Que les marchandises qui séront chargées sur vaisseaux Français appartenantes aux ennemis de notre Porte, ne puissent être prises sous couleur qu'ils sont de nos dits ennemis, puisque ainsi est nôtre vouloir."[1]

It became, at an early period, an object of interest with Holland, a great commercial and navigating country, whose permanent policy was essentially pacific, to obtain a relaxation of the severe rules which had been previously observed in maritime warfare. The States-General of the United Provinces having

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[1] Flassan, Histoire de la Diplomatie Française, tom. ii. p. 226. M. Flassan observes: — "C'est a tort qu'on a donné à ces Capitulations le nom de *traité*, lequel suppose deux parties contractantes, stipulans sur leurs intérêts; ici on ne trouve que des concessions de privelèges, et des exemptions de pure libéralité faites par la Porte à la France." In the first English edition of this work, and also in another more recently published, under the title of "History of the Law of Nations," the author has been misled, by following the authority of Azuni and other compilers, into the erroneous conclusion, that the above capitulation was intended to change the primitive law, as observed among the maritime States of the Mediterranean from the earliest times, and to substitute a more liberal rule for that of the Consolato del Mare, of which the Turks must necessarily be supposed to have been ignorant, and which the French king did not stipulate to relax in their favor, where the goods of his enemies should be found on board Turkish vessels.

complained of the provisions in the French ordinance of Henry II., 1538, a treaty of commerce was concluded between France and the Republic, in 1646, by which the operation of the ordinance, so far as respected the capture and confiscation of neutral vessels for carrying enemy's property, was suspended; but it was found impossible to obtain any relaxation as to the liability to capture of enemy's property in neutral vessels. The Dutch negotiator in Paris, in his correspondence with the grand pensionary De Witt, states that he had obtained the "repeal of the pretended French law, *que robe d'ennemi confisque celle d'ami;* so that if, for the future, there should be found in a free Dutch vessel effects belonging to the enemies of France, these effects alone will be confiscable, and the ship with the other goods will be restored; for it is impossible to obtain the twenty-fourth article of my Instructions, where it is said that the freedom of the ship ought to free the cargo, even if belonging to an enemy." This latter concession the United Provinces obtained from Spain by the treaty of 1650; from France by the treaty of alliance of 1662; and by the commercial treaty signed at the same time with the peace at Nimiguen in 1678, confirmed by the treaty of Ryswick in 1697. The same stipulation was continued in the treaty of the Pyrénées between France and Spain, in 1659. The rule of *free ships free goods* was coupled, in these treaties, with its correlative maxim, *enemy ships enemy goods.* The same concession was obtained by Holland from England, in 1668 and 1674, as the price of an alliance between the two countries against the ambitious designs of Louis XIV. These treaties gave rise, in the war which commenced in 1756 between France and Great Britain to a very remarkable controversy between the British and Dutch governments, in which it was contended, on the one side, that Great Britain had violated the rights of neutral commerce, and on the other, that the States-General had not fulfilled the guarantee which constituted the equivalent for the concession made to the neutral flag, in derogation of the preëxisting law of nations.[1]

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[1] Dumont, Corps Diplomatique, tom. vi. pt. i. p. 342. Flassan, Histoire de la Diplomatie Française, tom. iii. p. 451. A pamphlet was published on the occasion of this controversy between the British and Dutch governments, by the elder

A treaty of commerce and navigation was concluded between the Republic of England and the King of Portugal in 1654, by which the principle of *free ships free goods*, coupled with the correlative maxim of *enemy ships enemy goods*, was adopted between the contracting parties. This stipulation continued to form the conventional law between the two nations, also closely connected by political alliance, until the revision of this treaty in 1810, when the stipulation in question was omitted, and has never since been renewed.

The principle that the character of the vessel should determine that of the cargo, was adopted by the treaties of Utrecht of 1713, subsequently confirmed by those of 1721 and 1739, between Great Britain and Spain, by the treaty of Aix-la-Chapelle, in 1748, and of Paris in 1763, between Great Britain, France, and Spain.[1]

Armed neutrality of 1780.

Such was the state of the consuetudinary and conventional law prevailing among the principal maritime powers of Europe, when the declaration of independence by the British North American colonies, now constituting the United States, gave rise to a maritime war between France and Great Britain. With a view to conciliate those powers which remained neutral in this war, the cabinet of Versailles issued, on the 26th of July, 1778, an ordinance or instruction to the French cruisers, prohibiting the capture of neutral vessels, even when bound to or from enemy ports, unless laden in whole or in part with contraband articles destined for the enemy's use; reserving the right to revoke this concession, unless the enemy should adopt a reciprocal measure within six months. The British government, far from adopting any such measure, issued in March, 1780, an order in council suspending the special stipulations respecting neutral commerce and navigation contained in the treaty of alliance of 1674, between Great Britain and the United Provinces upon the alleged ground that the States-

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Lord Liverpool, (then Mr. Jenkinson,) entitled, "A Discourse on the Conduct of Great Britain in respect to Neutral Nations during the present War," which contains a very full and instructive discussion of the question of neutral navigation, both as resting on the primitive law of nations and on treaties. London, 8vo. 1757. 2d ed. 1794; 3d ed. 1801.

[1] Wheaton's Hist. Law of Nations, pp. 120–125.

General had refused to fulfil the reciprocal conditions of the treaty. Immediately after this order in council, the Empress Catharine II. of Russia communicated to the different belligerent and neutral powers the famous declaration of neutrality, the principles of which were acceded to by France, Spain, and the United States of America, as belligerent; and by Denmark, Sweden, Prussia, Holland, the Emperor of Germany, Portugal, and Naples, as neutral powers. By this declaration, which afterwards became the basis of the armed neutrality of the Baltic powers, the rule that free ships make free goods was adopted, without the previously associated maxim that enemy ships should make enemy goods. The court of London answered this declaration by appealing to the "principles generally acknowledged as the law of nations, being the only law between powers where no treaties subsist;" and to the "tenor of its different engagements with other powers, where those engagements had altered the primitive law by mutual stipulations, according to the will and convenience of the contracting parties." Circumstances rendered it convenient for the British government to dissemble its resentment towards Russia, and the other northern powers, and the war was terminated without any formal adjustment of this dispute between Great Britain, and the other members of the armed neutrality.[1]

By the treaties of peace concluded at Varsailles in 1783, between Great Britain, France, and Spain, the treaties of Utrecht were once more revived and confirmed. This confirmation was again reiterated in the commercial treaty of 1786, between France and Great Britain, by which the two kindred maxims were once more associated. In the negotiations at Lisle in 1797, it was proposed by the British plenipotentiary, Lord Malmesbury, to renew all the former treaties between the two countries confirmatory of those of Utrecht. This proposition was objected to by the French ministers, for several reasons foreign to the present subject; to which Lord Malmesbury replied that these treaties were become the law of nations, and

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[1] Flassan, Diplomatie Française, tom. vii. pp. 183, 273. Annual Register, vol. xxiii. p. 205, State Papers, pp. 345–356; vol. xxiv. p. 300, State Papers. Wheaton's Hist. Law of Nations, pp. 294–305.

that infinite confusion would result from their not being renewed. It is probable, however, that his lordship meant to refer to the territorial arrangements rather than to the commercial stipulations contained in these treaties. Be this as it may, the fact is, that they were not renewed, either by the treaty of Amiens in 1802, or by that of Paris in 1814.

During the protracted wars of the French Revolution all the belligerent powers began by discarding in practice, not only the principles of the armed neutrality, but even the generally received maxims of international law, by which the rights of neutral commerce in time of war had been previously regulated. "Russia," says Von Martens, "made common cause with Great Britain and with Prussia, to induce Denmark and Sweden to renounce all intercourse with France, and especially to prohibit their carrying goods to that country. The incompatibility of this pretension with the principles established by Russia in 1780, was veiled by the pretext, that in a war like that against revolutionary France, the rights of neutrality did not come in question." France, on her part, revived the severity of her ancient prize code, by decreeing, not only the capture and condemnation of the goods of her enemies found on board neutral vessels, but even of the vessels themselves laden with goods of British growth, produce, and manufacture. But in the further progress of the war, the principles which had formed the basis of the armed neutrality of the northern powers in 1780, were revived by a new maritime confederacy between Russia, Denmark, and Sweden, formed in 1800, to which Prussia acceded. This league was soon dissolved by the naval power of Great Britain and the death of the Emperor Paul; and the principle now in question was expressly relinquished by Russia in the convention signed at St. Petersburg in 1801, between that power and the British government, and subsequently acceded to by Denmark and Sweden. In 1807, in consequence of the stipulations contained in the treaty of Tilsit between Russia and France, a declaration was issued by the Russian court, in which the principles of the armed neutrality were proclaimed anew, and the convention of 1801 was annulled by the Emperor Alexander. In 1812, a treaty of alliance against France was signed by Great Britain and Russia; but no convention respect-

Armed neutrality of 1800.

ing the freedom of neutral commerce and navigation has been since concluded between these two powers.[1]

The international law of Europe adopted by America, and modified by treaty.

The maritime law of nations, by which the intercourse of the European States is regulated, has been adopted by the new communities which have sprung up in the western hemisphere, and was considered by the United States as obligatory upon them during the war of their revolution. During that war, the American courts of prize acted upon the generally received principles of European public law, that enemy's property in neutral vessels was liable to, whilst neutral property in an enemy's vessel was exempt from capture and confiscation; until Congress issued an ordinance recognizing the maxims of the armed neutrality of 1780, upon condition that they should be reciprocally acknowledged by the other belligerent powers. In the instructions given by Congress, in 1784, to their ministers appointed to treat with the different European courts, the same principles were proposed as the basis of negotiation by which the independence of the United States was to be recognized. During the wars of the French Revolution, the United States, being neutral, admitted that the immunity of their flag did not extend to cover enemy's property, as a principle founded in the customary law and established usage of nations, though they sought every opportunity of substituting for it the opposite maxim of *free ships free goods*, by conventional arrangements with such nations as were disposed to adopt that amendment of the law. In the course of the correspondence which which took place between the minister of the French Republic and the government of the United States, the latter affirmed that it could not be doubted that, by the general law of nations, the goods of a friend found in the vessel of an enemy are free, and the goods of an enemy found in the vessel of a friend are lawful prize. It was true, that several nations, desirous of avoiding the inconvenience of having their vessels stopped at sea, overhauled, carried into port, and detained, under pretence of having enemy's goods on board, had, in many instances, introduced, by special treaties, the principle that enemy ships should make enemy

[1] Wheaton's Hist. Law of Nations, pp. 397–401.

goods, and friendly ships friendly goods; a principle much less embarrassing to commerce, and equal to all parties in point of gain and loss: but this was altogether the effect of particular treaty, controlling in special cases the general principle of the law of nations, and therefore taking effect between such nations only as have so agreed to control it. England had generally determined to adhere to the rigorous principle, having in no instance, so far as was recollected, agreed to the modification of letting the property of the goods follow that of the vessel, except in the single one of her treaties with France. The United States had adopted this modification in their treaties with France, with the United Netherlands, and with Prussia; and, therefore, as to those powers, American vessels covered the goods of their enemies, and the United States lost their goods when in the vessels of the enemies of those powers. With Great Britain, Spain, Portugal, and Austria, the United States had then no treaties; and therefore had nothing to oppose them in acting according to the general law of nations, that enemy goods are lawful prize though found in the ships of a friend. Nor was it perceived that France could, on the whole, suffer; for though she lost her goods in American vessels, when found therein by England, Spain, Portugal, or Austria; yet she gained American goods when found in the vessels of England, Spain, Portugal, Austria, the United Netherlands, or Prussia: and as the Americans had more goods afloat in the vessels of those six nations, than France had afloat in their vessels, France was the gainer, and they the losers, by the principle of the treaty between the two countries. Indeed, the United States were the losers in every direction of that principle; for when it worked in their favor, it was to save the goods of their friends; when it worked against them, it was to lose their own, and they would continue to lose whilst it was only partially established. When they should have established it with all nations, they would be in a condition neither to gain nor lose, but would be less exposed to vexatious searches at sea. To this condition the United States were endeavoring to advance; but as it depended on the will of other nations, they could only obtain it when others should be ready to concur.[1]

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[1] Mr. Jefferson's Letter to M. Genet, July 24, 1793. Waites' State Papers,

By the treaty of 1794 between the United States and Great Britain, article 17, it was stipulated that vessels, captured on suspicion of having on board enemy's property or contraband of war, should be carried to the nearest port for adjudication, and that part of the cargo only which consisted of enemy's property, or contraband for the enemy's use, should be made prize, and the vessel be at liberty to proceed with the remainder of her cargo. In the treaty of 1778, between France and the United States, the rule of *free ships free goods* had been stipulated; and, as we have already seen, France complained that her goods were taken out of American vessels without resistance by the United States; who, it was alleged, had abandoned by their treaty with Great Britain their antecedent engagements to France, recognizing the principles of the armed neutrality.

To these complaints, it was answered by the American government, that when the treaty of 1778 was concluded, the armed neutrality had not been formed, and consequently the state of things on which that treaty operated was regulated by the pre-existing law of nations, independently of the principles of the armed neutrality. By that law, free ships did not make free goods, nor enemy ships enemy goods. The stipulation, therefore, in the treaty of 1778 formed an exception to a general rule, which retained its obligation in all cases where not changed by compact. Had the treaty of 1794 between the United States and Great Britain not been formed, or had it entirely omitted any stipulation on this subject, the belligerent right would still have existed. The treaty did not concede a new right, but only mitigated the practical exercise of a right already acknowledged to exist. The desire of establishing universally the principle, that neutral ships should make neutral goods was felt by no nation more strongly than by the United States. It was an object which they kept in view, and would pursue by such means as their judgment might dictate. But the wish to establish a principle was essentially different from an assumption that it is already established. However solicitous America might be to pursue all proper means tending to obtain the concession of this

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vol. i. p. 134. See also President Jefferson's Letter to Mr. R. R. Livingston, American Minister at Paris, Sept. 9, 1801. Jefferson's Memoirs, vol. iii. p. 489.

principle by any or all of the maritime powers of Europe, she had never conceived the idea of obtaining that consent by force. The United States would only arm to defend their own rights: neither their policy nor their interests permitted them to arm in order to compel a surrender of the rights of others.[1]

Discussion between the American and Prussian governments.

The principle of *free ships free goods*, had been stipulated by the treaty of 1785, art. 12, between the United States and Prussia, without the correlative maxim of *enemy ships enemy goods*. By the 12th article of this treaty it was provided, that "if one of the contracting parties should be engaged in war with any other power, the free intercourse and commerce of the subjects or citizens of the party remaining neuter, with the belligerent powers, shall not be interrupted. On the contrary, in that case, as in full peace, the vessels of the neutral party may navigate freely to and from the ports and on the coasts of the belligerent parties, free vessels making free goods, insomuch that all things shall be adjudged free which shall be on board any vessel belonging to the neutral party, although such things belong to an enemy of the other; and the same freedom shall be extended to persons who shall be on board a free vessel, although they should be enemies to the other party, unless they be soldiers in actual service of such enemy."

The above treaty having expired, by its own limitation, in 1796, a negotiation was commenced by the American and Prussian governments for its renewal. In the instructions given by the former to its plenipotentiary, Mr. J. Q. Adams, it was stated that the principle of *free ships free goods*, recognized in the 12th article, was a principle which the United States had adopted in all their treaties, (except that with Great Britain,) and which they sincerely desired might become universal; but they had found by experience, that treaties formed for this object were of little or no avail; because the principle was not universally admitted among maritime nations. It had not been observed in respect to the United States, when it would operate to their benefit; and might be insisted on only when it would prove inju-

[1] Letter of the American Envoys at Paris, Messrs. Marshall, Pinkney, and Gerry, to M. de Talleyrand, Jan. 17, 1798. Waite's State Papers, vol. iv. pp. 38–47.

rious to their interests. The American plenipotentiary was therefore directed to propose to the Prussian cabinet the abandonment of this article in the new treaty which he was empowered to negotiate.[1]

It was further stated, in an additional explanatory instruction given by the American government to its plenipotentiary, that, in the former instruction, the earnest wishes of the United States were meant to be expressed, that the principle of *free ships free goods* should become universal. This principle was peculiarly interesting to them, because their naval concerns were mercantile, and not warlike; and it would readily be perceived, that the abandonment of that principle was suggested by the measures of the belligerent powers, during the war then existing, in which the United States had found, that neither the obligations of the pretended modern law of nations, nor the solemn stipulations of treaties, secured its observation; on the contrary, it had been made the sport of events. Under such circumstances, it appeared to the President desirable to avoid renewing an obligation, which would probably be enforced when their interest might require its dissolution, and be contemned when they might derive some advantage from its observance. It was possible, that in the then pending negotiations of peace, the principle of *free ships free goods* might be adopted by all the great maritime powers; in which case, the United States would be among the first of the other powers to accede to it, and to observe it as a universal rule. The result of these negotiations would probably be known to the American plenipotentiary, before the renewal of the Prussian Treaty; and he was directed to conform his stipulations on this point to the result of those negotiations. But if the negotiations for peace should be broken up, and the war continued, and more especially if the United States should be forced to become a party to it, then it would be extremely impolitic to confine the exertions of their armed vessels within narrower limits than the law of nations prescribes. If, for instance, France should proceed, from her predatory attacks on American commerce, to open war, the mischievous consequences of any other

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[1] Mr. Secretary Pickering to Mr. John Quincy Adams, Minister of the U. S. at Berlin, July 15, 1797.

limitations would be apparent. All her commerce would be sheltered under neutral flags; whilst the American commerce would remain exposed to the havoc of her numerous cruisers.[1]

In acknowledging the receipt of these instructions, the American plenipotentiary questioned the expediency of the proposed alteration, in the stipulation contained in the 12th article of the Treaty of 1785. He stated that the principle of making free ships protect enemy's property, had always been cherished by the maritime powers not having large navies, though stipulations to that effect had been, in all wars, more or less violated. In the then present war, indeed, they had been less respected than usual; because Great Britain had held a more uncontrolled command of the sea, and had been less disposed than ever to concede the principle; and because France had disclaimed most of the received and established ideas upon the law of nations, and considered herself as liberated from all the obligations towards other States which interfered with her present objects, or the interests of the moment. Even during that war, however, several decrees of the French Convention, passed at times when the force of solemn national engagements was felt, had recognized the promise contained in the Treaty of 1778, between the United States and France; and, at times, this promise had been, in a great degree, observed. France was still attached to the principles of the armed neutrality, and yet more attached to the idea of compelling Great Britain to assent to them. Indeed, every naval State was interested in the maintenance of liberal maxims in maritime affairs, against the domineering policy of the latter power. Every instance, therefore, in which those principles which favor the rights of neutrality should be abandoned by neutral powers, was to be regretted, as furnishing argument, or at least example, to support the British doctrines. There was certainly a great inconvenience when two maritime States were at war, for a neutral nation to be bound by one principle to one of the parties, and by its opposite to the other; and, in such cases, it was never to be expected that an engagement favorable to the rights of neutrality would be scrupulously observed by either of the warring States. It appeared to the American pleni-

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[1] Mr. Secretary Pickering to Mr. John Quincy Adams, July 17, 1797.

potentiary that the stipulation ought to be made contingent, and that the contracting parties should agree, that in all cases when one of the parties should be at war and the other neutral, the neutral bottom should cover enemy's property, *provided the enemy of the warring power admitted the same principle*, and practised upon it in their Courts of Admiralty; but if not, that the rigorous rule of the ordinary law of nations should be observed.[1]

In a subsequent communication of the American plenipotentiary to his government, he states that he should be guided by its instructions relative to this matter, although he was still of opinion that the proposed alteration in the previous treaty would be inexpedient. Sweden and Prussia were both strongly attached to the principle of making the ship protect the cargo. They had more than once contended, that such is the rule even by the ordinary law of nations. A Danish writer of some reputation, in a treatise upon the commerce of neutrals in time of war, had laid it down as a rule, and argued formally, that, by the law of nature, free ships make free goods.[2] Lampredi, a recent Florentine author, upon the same topic, had discussed the question at length; and contended that by the natural law, in this case, there is a collision of two rights equally valid; that the belligerent has a right to detain, but that the neutral has an equal right to refuse to be detained. This reduced the matter to a mere question of force, in which the belligerent, being armed, naturally enjoys the best advantage.[3] He confessed that the reasoning of Lampredi had, in his mind, great weight, and that this writer appeared to have stated the question in its true light. Under these circumstances, he intended to propose a conditional article, putting the principle upon a footing of reciprocity, and agreeing that the principle, with regard to bottom and cargo, should depend upon the principle guiding the Admiralty Courts of the enemy. This would at once discover the American inclination and attachment to the liberal rule, and yet not make

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[1] Mr. J. Q. Adams to Mr. Secretary Pickering, October 31, 1797, May 17, 1798.

[2] Hübner, De la Saisie des Batimens neutres. Wheaton's Hist. Law of Nations, pp. 219–229.

[3] Lampredi, Del Commercio dei Popoli neutrali in Tempo de Guerra. Wheaton's Hist. Law of Nations, pp. 314, 319.

them the victims of their adherence to it, while violated by their adversaries. Acting under the instructions of his government, he should not accede to the renewal of the article, under its form in the previous treaty.[1]

The American negotiator, following the letter of his instructions, proposed, in the first instance, to the Prussian plenipotentiaries, to substitute, instead of this article, the ordinary rule of the law of nations, which subjects to seizure enemy's property on board of neutral vessels. This proposition was supported, upon the ground that although the principle, which communicates to the cargo the character of the vessel, would be conformable to the interests of the United States, of Prussia, and of all the powers preserving neutrality in maritime wars, if it could be universally acknowledged and respected by the belligerent powers; yet it was well known that the powers most frequently engaged in naval wars did not recognize, or, if they recognized, did not respect, the principle. The United States had experienced, during the then present war, the fact, that even the most formal treaty did not secure to them the advantage of this principle; but, on the contrary, only contributed to accumulate the losses of their citizens, by encouraging them to load their vessels with merchandise declared free, which they had, notwithstanding, seen taken and confiscated, as if no engagement had promised them complete security. At the then present moment, neither of the powers at war admitted the freedom of enemy's property on board of neutral vessels. If, in the course of events, either of the contracting parties should be involved in war with one or the other of those powers, she would be obliged to behold her enemy possess the advantage of a free conveyance for his goods, without possessing the advantage herself, or else to violate her own engagements, by treating the neutral party as the enemy should treat her.[2]

The Prussian plenipotentiaries, in their answer to these arguments, stated that it could not be denied that the ancient principle of the freedom of navigation had been little respected in

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[1] Mr. J. Q. Adams to Mr. Secretary Pickering, May 25, 1798.

[2] Mr. J. Q. Adams to MM. Finkenstein, Alvensleben, and Haugwitz, July 11th, 1798.

the two last wars, and especially in that which still subsisted; but it was not the less true that it had served, until the present time, as the basis of the commerce of all neutral nations; that it had been, and was still maintained, in consequence. If it should be suddenly abandoned and subverted, in the midst of the then present war, the following consequences would result: —

1. An inevitable confusion in all the commercial speculations of neutral nations, and the rejection of all the claims prosecuted by them in the Admiralty Courts of France and Great Britain, for illegal captures.

2. A collision with the northern powers, which sustained the ancient principle, at that very moment, by armed convoys.

3. Nothing would be gained in establishing, at the present moment, the principle that *neutral property on board enemy vessels should be free from capture.* The belligerent powers would be no more disposed to admit this principle than the other, and it would furnish an additional reason to authorize their tribunals to condemn prizes made in contravention of the ancient rule.

4. Even supposing that the great maritime powers of Europe should be willing to recognize the principle proposed to be substituted by the United States, it would only increase the existing embarrassments incident to judicial proceedings respecting maritime captures; as, instead of determining the national character of the cargo by that of the vessel, it would become necessary to furnish separate proofs applicable to each.

All these difficulties combined induced the Prussian minister to insist on inserting the 12th article of the Treaty of 1785 in the new treaty, qualified with the following additional stipulation: —

"That experience having unfortunately proved, in the course of the present war, that the ancient principle of free neutral navigation has not been sufficiently respected by the belligerent powers, the two contracting parties propose, after the restoration of a general peace, to agree, either separately between themselves, or jointly with the other powers alike interested, to concert with the great maritime powers of Europe such an arrangement as may serve to establish, by fixed and permanent rules, the freedom and safety of neutral navigation in future wars."[1]

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[1] MM. Finkenstein, Alvensleben, and Haugwitz, to Mr. J. Q. Adams, 25th September, 1798.

The American negotiator, in his reply to this communication, stated, that the alteration in the former treaty, proposed by his government, was founded on the supposition, that, by the ordinary law of nations, enemy's property, on board of neutral vessels, is subject to capture, whilst neutral property, on board of enemy's vessels, is free. That this rule could not be changed but by the consent of all maritime powers, or by special treaties, the stipulations of which could only extend to the contracting parties. That the opposite principle, the establishment of which was one of the main objects of the armed neutrality during the war of American Independence, had not been universally recognized even at that period; and had not been observed, during the then present war, by any one of the powers who acceded to that system. That Prussia herself, whilst she remained a party to the war against France, did not admit the principle; and that, at the then present moment, the ancient principle of the law of nations subsisted in its whole force between all the powers, except in those cases where the contrary rule was stipulated by a positive treaty.

In proposing, therefore, to recognize the freedom of neutral property on board of enemy's vessels, and to recognize, as subject to capture, enemy's property, on board of neutral vessels, nothing more was intended than to confirm by the treaty those principles which already existed independently of all treaty; it was not intended to make, but to avoid a change, in the actual order of things.

Far from wishing to dictate, in this respect, to the belligerent powers, it had not been supposed that an agreement between Prussia and the United States could, in any manner, serve as a rule to other powers not parties to the treaty, in respect to maritime captures; and as the effect of such a convention, even between the contracting parties, would not be retroactive, but would respect the future only, it had been still less supposed that the just claims of the subjects of neutral powers, whether in England or in France, on account of illegal captures, could be in any manner affected by it.

Nor had it been apprehended that such a convention would produce any collision with the northern powers, since they could not be bound by a treaty to which they were not parties; and this suppposed contradiction would still less concern Russia,

because, far from having maintained the principle that the neutral flag covers enemy's property, she had engaged by her convention with Great Britain, of the 25th of March, 1793, to employ all her efforts against it during the then present war.

Sweden and Denmark, by their convention of the 27th March, 1794, engaged reciprocally towards each other, and towards all Europe, not to claim, except in those cases expressly provided for by treaty, any advantage not founded upon the universal law of nations, "recognized and respected unto the present time by all the powers and by all the sovereigns of Europe." It was not conceived possible to include, under this description, the principle that the cargo must abide the doom of the flag under which it is transported; and it might be added, that experience had constantly demonstrated the insufficiency of armed convoys to protect this principle, since they were seen regularly following, without resistance, the merchant vessel under their convoy into the ports of the belligerent powers, to be there adjudged according to the principles established by their tribunals; principles which were entirely contrary to that by which the ship neutralizes the cargo.

According to the usage adopted by the tribunals of all maritime States, the proofs as to the national character of the cargo ought to be distinct from those which concern that of the vessel. Even in those treaties which adopt the principle that the flag covers the property, it is usual to stipulate for papers applicable to the cargo, in order to show that it is not contraband. The charter-party and the bills of lading had been referred to by the Prussian ministers, as being required by the Prussian tribunals, and which it was proposed to designate as essential documents in the new treaty. It would seem, then, that the adoption of the principle in question would not require a single additional paper, and, consequently, would not increase the difficulty of prosecuting claims against captors; at the utmost, it could only be regarded as a very small inconvenience, in comparison with the losses occasioned by the recognition of a principle already abandoned by almost all the maritime powers, and which had been efficaciously sustained by none of them; of a principle which would operate injuriously to either of the contracting parties that might be engaged in war, whilst its enemy would not respect it, and that party which remained neutral would hold out

to its subjects the illusory promise of a free trade, only to see it intercepted and destroyed.

But as the views of the Prussian government appeared, in some respects, to differ from those of the American, in regard to the true principle of the law of nations, and it appeared to the Prussian ministers that several inconveniences might result from the substitution of the opposite principle to that contained in the former treaty, the American negotiator proposed, as an alternative, to omit entirely the stipulations of the 12th article in the new treaty; the effect of which would be, to leave the question in its then present situation, without engaging either of the contracting parties in any special stipulation respecting it. And as the establishment of a permanent and stable system, with the hope of seeing it maintained and respected in future wars, was an important object to commerce in general, and especially to that of the contracting parties, he was willing to consent to an eventual stipulation similar to that proposed by the Prussian ministers; but which, without implying, on either part, the admission of a contested principle, should postpone the decision of it until after the general peace, either by an ulterior agreement between the contracting parties, or in concert with other powers interested in the question. The United States would always be disposed to adopt the most liberal principles that might be desired, in favor of the freedom of neutral commerce in time of war, whenever there should be a reasonable expectation of seeing them adopted and recognized in a manner that might secure their practical execution.[1]

The Prussian ministers replied to this counter-proposition, by admitting that the rule by which neutral property, found on board enemy vessels, was free from capture, had been formerly followed by the greater part of European powers, and was established in several treaties of the fourteenth and fifteenth centuries; but they asserted that it had been abandoned by maritime and commercial nations, ever since the inconveniences resulting from it had become manifest. In the two treaties concluded as early as 1646, by the United Provinces, with France and with

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[1] Mr. J. Q. Adams to MM. Finkenstein, Alvensleben, and Haugwitz, October 29th, 1798.

England, the rules of free ships free goods, and of enemy ships enemy goods, were stipulated; and these principles, once laid down, had been repeated in almost all the treaties since concluded between the different commercial nations of Europe. The Convention of 1793, between Russia and England, to which the American negotiator had referred, was exclusively directed against France, and merely formed an exception to the rule; and if, during the commencement of the revolutionary war, the allied powers deemed it necessary to deviate from the recognized principle, this momentary deviation could only be attributed to peculiar circumstances, and it was not the less certain that Prussia had never followed any other than one and the same permanent system, relative to neutral commerce and navigation. This system was founded upon the maxim announced in the 12th article of her former treaty with the United States, which best accorded with the general convenience of commercial nations, by simplifying the proofs of national character, and exempting neutral navigation from vexatious search and interruption.

The Prussian ministers also declared their conviction that, during the then present war, when the commerce and navigation of neutral nations had been subjected to so many arbitrary measures, the principle proposed by the American negotiator would not be more respected than the former rule; several recent examples having demonstrated that even neutral vessels, exclusively laden with neutral property, had been subjected to capture and confiscation, under the most frivolous pretexts. But it would be useless to prolong the discussion, as both the parties to the negotiation were agreed that, instead of hazarding a new stipulation, eventual and uncertain in its effects, it would be better to leave it in suspense until the epoch of a general peace, and then to seek for the means of securing the freedom of neutral commerce upon a solid basis during future wars. The Prussian ministers, therefore, proposed to suppress provisionally the 12th article of the former treaty, and to substitute in its place the following stipulation: —

"Experience having demonstrated, that the principle adopted in the 12th article of the Treaty of 1785, according to which free ships make free goods, has not been sufficiently respected during the last two wars, and especially in that which still subsists; and the contradictory dispositions of the principal belligerent powers

not allowing the question in controversy to be determined in a satisfactory manner at the present moment, the two high contracting parties propose, after the return of a general peace, to agree, either separately between themselves, or conjointly with other powers alike interested, to concert with the great maritime powers of Europe such arrangements and such permanent principles, as may serve to consolidate the liberty of neutral navigation and commerce in future wars."[1]

In his reply to this note, the American negotiator declared that he would not hesitate to subscribe to the stipulation proposed by the Prussian ministers, if the following words could be omitted: "And the contradictory dispositions of the principal belligerent powers not allowing the question in controversy to be determined in a satisfactory manner at the present moment." It was possible that the belligerent powers might find in these expressions a kind of sanction to their dispositions, which would not accord with the intentions of the contracting parties; and, besides, the American negotiator would desire to omit entirely an allusion to a point, of which it was the wish of the two governments to defer the consideration, rather than to announce it formally as a contested question.

In order to justify the opinion of his government on the subject of the principle in question, he deemed it his duty to observe, that this opinion was not founded on the treaties of the fourteenth and fifteenth centuries. He considered the principle of the law of nations as absolutely distinct from the engagements stipulated by particular treaties. These treaties could not establish a fixed principle on this point; because such stipulations bound only the parties by whom they were made, and the persons on whom they operated; and because, too, in the seventeenth and eighteenth centuries, as well as in the fourteenth and fifteenth, different treaties had adopted different rules for each particular case, according to the convenience and agreement of the contracting parties.

Rejecting, therefore, all positive engagements stipulated in treaties, it might well be doubted whether a single example could

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[1] MM. Finkenstein, Alvensleben, and Haugwitz, to Mr. J. Q. Adams, 29th October, 1798.

be found, antecedent to the American war, of a maritime belligerent power which had adopted the principle, that enemy's property is protected by a neutral flag. For, without speaking of England, whose system in this respect is known, France, by the Ordinance of 1774, renewing the provisions of that of 1681, declared enemy's property, on board neutral vessels, subject to seizure and confiscation. It excepted from this rule the ships of Denmark and the United Provinces, conformably to the treaties then existing between these powers and France. This ordinance continued to have its effect in the French tribunals until the epoch of the Ordinance of the 26th July, 1778. By the first article of this last ordinance the freedom of enemy's property, on board of neutral ships, is yielded to neutrals as a favor, but not as a principle of the law of nations, since the power is reserved to withdraw it at the expiration of six months, if a reciprocal stipulation should not be conceded by the enemy. Spain, by the Ordinance of the 1st of July, 1779, and the 13th March, 1780, ordered, in like manner, the seizure and confiscation of enemy's property, found on neutral vessels.

It would only be added that a celebrated public jurist, a Prussian subject, who, in the first part of the 18th century, wrote a highly esteemed work upon the law of nations, Vattel, says expressly, (Book 3, sect. 115,) that "when effects belonging to an enemy are found on board a neutral vessel, they may be seized by the laws of war." He cited no example where the opposite principle had been practiced or insisted on.

When, however, the system of armed neutrality was announced, the United States, although a belligerent power, hastened to adopt its principles; and during the period succeeding this epoch, in which they were engaged in war, they scrupulously conformed to them. But on the first occasion when, as a neutral power, they might have enjoyed the advantages attached to this system, they saw themselves deprived of these advantages, not only by the powers who had never acceded to those principles, but also even by the founders of the system. The intentions of the combined powers, it was true, were exclusively directed against France; but the operation of their measures did not less extend to all neutrals, and especially to the United States. However peculiar might have been the circumstances of the war, the rights of neutrality could not be thereby affected. The

United States had regretted the abandonment of principles favorable to the rights of neutrality, but they had perceived their inability to prevent it; and were persuaded that equity could not require of them to be the victims, at the same time, both of the rule and of the exception; to be bound, as a belligerent party, by laws of the advantage of which, as a neutral power, they were wholly deprived.

It was the wish, however, of the United States government to prove, that it had no desire to depart from the principles adopted by the treaty of 1785, except upon occasions when an adherence to those principles would be an act of injustice to the nation whose interests were confided to it. The American negotiator therefore agreed to adopt the proposed new stipulation, excepting the words above cited, and adding the following clause: —

"And if, during this interval, one of the high contracting parties shall be engaged in a war, to which the other is neutral, the belligerent power will respect all the property of enemies laden on board the vessel of the neutral party, provided that the other belligerent power shall acknowledge the same principle with regard to every neutral vessel, and that the decisions of his maritime tribunals shall conform to it."

If this proposition should not be acceptable to the Prussian cabinet, then the American negotiator proposed to adopt nearly the formula of the treaty of 1766 between Prussia and Great Britain, and to stipulate that "as to the search of merchant vessels, in time of war, the vessels of war and the private armed vessels of the belligerent power will conduct themselves as favorably as the objects of the then existing war will permit; observing, as much as possible, the principles and rules of the law of nations as generally recognized."[1]

The treaty was finally concluded on the 11th July, 1799, with the article on this subject proposed by the Prussian plenipotentiaries, and modified on the suggestion of the American negotiator in the following terms: —

"Art. 12. Experience having proved that the principle adopted in the twelfth article of the treaty of 1785, according to which

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[1] Mr. J. Q. Adams to MM. Finkenstein, Alvensleben and Haugwitz, 24th December, 1799.

free ships make free goods, has not been sufficiently respected during the last two wars, and especially in that which still continues, the two contracting parties propose, after the return of a general peace, to agree, either separately between themselves, or jointly with other powers alike interested, to concert with the great maritime powers of Europe such arrangements and such permanent principles, as may serve to consolidate the liberty and the safety of the neutral navigation and commerce in future wars. And if, in the interval, either of the contracting parties should be engaged in war, to which the other should remain neutral, the ships of war and privateers of the belligerent power shall conduct themselves towards the merchant vessels of the neutral power, as favorably as the course of the war then existing may permit; observing the principles and rules of the law of nations generally acknowledged."[1]

On the expiration of the treaty of 1799, the twelfth article of the original treaty of 1785 was again revived, by the present subsisting treaty between the United States and Prussia of 1828, with the addition of the following clause: —

"The parties being still desirous, in conformity with their intention declared in the twelfth article of the said treaty of 1799, to establish between themselves, or in concert with other maritime powers, further provisions to insure just protection and freedom to neutral navigation and commerce, and which may at the same time advance the cause of civilization and humanity, engage again to treat on this subject at some future and convenient period."

During the war which commenced between the United States and Great Britain in 1812, the prize courts of the former uniformly enforced the generally acknowledged rule of international law, that enemy's goods in neutral vessels are liable to capture and confiscation, except as to such powers with whom the American government had stipulated by subsisting treaties the contrary rule, that free ships should make free goods.

In their earliest negotiations with the newly established republics of South America, the United States proposed the establishment of the principle of *free ships free goods*, as be-

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[1] American State Papers, fol. edit. vol. ii. pp. 251–269.

tween all the powers of the North and South American continents. It was declared that the rule of public law — that the property of an enemy is liable to capture in the vessels of a friend, has no foundation in natural right, and, though it be the established usage of nations, rests entirely on the abuse of force. No neutral nation, it was said, was bound to submit to the usage; and though the neutral may have yielded at one time to the practice, it did not follow that the right to vindicate by force the security of the neutral flag at another, was thereby permanently sacrificed. But the neutral claim to cover enemy's property was conceded to be subject to this qualification; that a belligerent may justly refuse to neutrals the benefit of this principle, unless admitted also by their enemy for the protection of the same neutral flag. It is accordingly stipulated, in the treaty between the United States and the Republic of Columbia, that the rule of *free ships free goods* should be understood "as applying to those powers only who recognize this principle; but if either of the two contracting parties shall be at war with a third, and the other neutral, the flag of the neutral shall cover the property of enemies whose governments acknowledge the same principle, and not of others." The same restriction of the rule had been previously incorporated into the treaty of 1819, between the United States and Spain, and has been subsequently inserted in their different treaties with the other South American Republics.[1]

It has been decided in the prize courts, both of the United States and of Great Britain, that the privilege of the neutral flag of protecting enemy's property, whether stipulated by treaty or established by municipal ordinances, however comprehensive may be the terms in which it may be expressed, cannot be interpreted to extend to the fraudulent use of that flag to cover enemy's property in the *ship*, as well as the cargo.[2] Thus dur-

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[1] Mr. Secretary Adams's Letter to Mr. Anderson, American minister to the Republic of Columbia, 27th of May, 1823. For the practice of the prize court, as to the allowance or refusal of freight on enemies' goods taken on board neutral ships, and on neutral goods found on board an enemy's ship, see Wheaton's Rep. vol. ii. Appendix, Note I. pp. 54-56.

[2] Robinson's Adm. Rep. vol. vi. p. 358. The Citade de Lisboa.

ing the war of the Revolution, the United States, recognizing the principles of the armed neutrality of 1780, exempted by an ordinance of Congress all neutral vessels from capture, except such as were employed in carrying contraband goods, or soldiers, to the enemy; it was held by the continental Court of Appeals in prize causes, that this exemption did not extend to a vessel which had forfeited her privilege by grossly unneutral conduct in taking a decided part with the enemy, by combining with his subjects to wrest out of the hands of the United States, and of France, their ally, the advantages they had acquired over Great Britain by the rights of war in the conquest of Dominica. By the capitulation of that island, all commercial intercourse with Great Britain had been prohibited. In the case in question, the vessel had been purchased in London, by neutrals, who supplied her with false and colorable papers, and assumed on themselves the ownership of the cargo for a voyage from London to Dominica. Had she been employed in a fair commerce, such as was consistent with the rights of neutrality, her cargo, though the property of an enemy, could not be seized as prize of war; because Congress had said, by their ordinance, that the rights of neutrality should extend protection to such effects and goods of an enemy. But if the neutrality were violated, Congress had not said that such a violated neutrality shall give such protection. Nor could they have said so, without confounding all the distinctions of right and wrong; and Congress did not mean, in their ordinance, to ascertain in what cases the rights of neutrality should be forfeited, to the exclusion of all other cases; for the instances not mentioned were as flagrant as the cases particularized.[1]

By the treaty of 1654, between England and Portugal, it was stipulated, (art. 23,) "That all goods and merchandise of the said Republic or King, or of their people, or subjects found on board the ships of the enemies of either, shall be made prize, together with the ships, and confiscated. But all the goods and merchandise of the enemies of either on board the ships of either, or of their people or subjects, shall remain free and untouched."

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[1] Dallas's Rep. vol. ii. p. 34. The Erstern.

Under this stipulation, thus coupling the two opposite maxims of *free ships free goods*, and *enemy ships enemy goods*, it was determined by the British prize courts, that the former provision of this article, which subjects to condemnation the goods of either nation found on board the ships of the enemy of the other contracting party, could not be fairly applied to the case of property *shipped before the contemplation of war*. Sir W. Scott (Lord Stowell) observed, in delivering his judgment in this case, that it did not follow, that because *Spanish* property put on board a *Portuguese* ship, would be protected in the event of the interruption of war, therefore *Portuguese* property on board a *Spanish* ship should become instantly confiscable on the breaking out of hostilities with Spain: that, in one case, the conduct of the parties would not have been different, if the event of hostilities had been known. The cargo was entitled to the protection of the ship, generally, by this stipulation of the treaty, even if shipped in open war; and *à fortiori*, if shipped under circumstances still more favorable to the neutrality of the transaction. In the other case, there might be reason to suppose, that the treaty referred only to goods shipped on board an enemy's vessel, in an avowed hostile character; and that the neutral merchant would have acted differently, if he had been apprized of the character of the vessel at the time when the goods were put on board.[1]

The same principle has been frequently incorporated into treaties between various nations, by which the principle of *free ships free goods* is associated with that of *enemy ships enemy goods*. The treaties of Utrecht expressly recognize it, and it has been also incorporated into the different treaties between the United States and the South American Republics, with this qualification, "that it shall always be understood, that the neutral property found on board such enemy's vessels shall be held and considered as enemy's property, and as such shall be liable to detention and confiscation, except such property as was put on board such vessel before the declaration of war, or even afterwards, if it were done without the knowledge of it; but the con-

1 Robinson's Adm. Rep. vol. v. p. 28. The Marianna.

tracting parties agree that *two* months having elapsed after the declaration, their citizens shall not plead ignorance thereof."[1] (*a*)

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[1] Treaty of 1828, between the United States and Columbia, art. 13. By the treaty of 1831, between the United States and Mexico; by that of 1834, with Chili, art. 13, the term of *four* months is established for the same purpose, and by that of 1842, with Equador, art. 16, the term of *six* months.

(*a*) [In the relations of neutrals and belligerents, as regards the rules of maritime law, the present European war has produced the most important modifications. Though the treaties of commerce, concluded at Utrecht, between the principal maritime powers, were repeatedly renewed by conventions, to which England was a party, and, though in the case of the Spanish marriages, in 1846, she invoked the political arrangements there entered into, having for their object to prevent the union of the French and Spanish crowns, neither her government nor her courts of admiralty have, since her ascendency on the ocean has been established, admitted that the rules of maritime law there recognized were binding as the common law of nations; but they have maintained that their operation was confined to the contracting parties. Whatever fluctuations her orders in council have, in other respects, occasioned in her maritime code, yet England has constantly asserted, as a general principle, in the absence of conventional engagements, that enemy's goods, on board of neutral vessels are good prize, while she has conceded the immunity of neutral goods in enemy's ships. The latter part of the rule, however, was not unfrequently rendered nugatory by an arbitrary law of contraband, and by the prohibition of the enemy's coasting and colonial trade, extending sometimes to a practical interdict of all neutral commerce.

England had, indeed, in all her treaties with France from the year 1655 to 1786, it being recognized in five treaties of peace and three commercial conventions, adopted the rule that *free ships make free goods;* and the same principle is found in most of her treaties with other powers, before the French Revolution. But for the last three quarters of a century, her policy had been different even as respects treaty stipulations, and since the commercial convention with France of 1786, she had entered into no new compact to the prejudice of her belligerent pretensions; and which, as asserted by her, under the plea of the right of search, enabled her to institute a police over all neutral navigation, applying not only to the merchandise, but extending to an investigation, tested by her own municipal laws, of the nationality of the crew, with a view of subjecting them, by impressment, to a forced duty in her military marine.

The only treaty, containing the provision that the flag covered the property of the cargo, to which England was a party, that was operative during any portion of the wars between 1793 and 1814, was that of 1654 with Portugal, and which, as regards that point, was abrogated by the treaty of commerce of 19th February, 1810. The mutual abandonment of the privilege, granted by former treaties to vessels of the respective countries to carry merchandise, belonging to the enemies of the other, is also repeated in the subsisting treaty between these powers of 13th July, 1842.

The general freedom of neutral commerce with the respective belligerent powers is subject to some exceptions. Among these is the trade with the enemy in cer- § 24. Contraband of war.

England succeeded in having her views recognized, with some concessions, after the failure of the second armed neutrality, in the maritime convention of 1801, with Russia, to which Sweden and Denmark acceded, as well as in the treaty of 1794 with the United States. And she ever resisted the attempts, made by the latter power, previously to the present war, to induce her to take into consideration, with a view to their modification, those rules of maritime law, which though recognized by the courts of both countries were at variance with the common sense of Christendom, as shown by the general current of conventional stipulations during the last two centuries. In 1823, it was proposed by us to discuss them in connection with the abolition of privateering, but with no other success than attended the suggestions on that subject. Nor, in 1826–7, when many questions in controversy between the two countries were settled, was there any better disposition manifested to examine the conflicting maritime principles. See Schoell, Histoire des Traités de Paix, tom. ii. pp. 108, 121. Id. tom. iv. p. 21. Id. tom. x. pp. 44, 127. Annual Reg. 1846, p. 286. Hautefeuille, Droits des Nations Neutres, tom. iii. p. 270. Mr. Rush to Mr. Adams, August 12, 1824. Cong. Doc. Senate, 18 Cong. 2 Sess. Confidential, p. 99. Mr. Gallatin to Mr. Clay, Secretary of State, 26th September, 1827, MS.

Notwithstanding the capitulation granted by the Ottoman Porte to Henry IV., in 1604, according immunity to French property in enemy's ships, while it allowed the French flag to protect enemy's property, was the first concession to that extent, in favor of neutrals, the internal ordinances of France were not only inconsistent with the numerous treaties, including those of Utrecht, to which she was a party, but were even more severe than those of England, or of the *Consolato del Mare*, on which the latter were based. That code, while it authorized the condemnation of enemy's property, on board of neutral vessels, left free the vessel itself and the rest of the cargo, and moreover allowed freight to the place of destination to the neutral carrier, with an indemnity for the detention.

By a decree of Francis I., in 1543, (the principles of which, after some temporary modifications, were reaffirmed in the marine ordinance of 1681, and which continued in force till 1744,) not only was enemy's property, on board of a neutral vessel, condemned, but the vessel itself and the rest of the cargo were, also, confiscated. At the same time, the goods of a friend, laden on board of an enemy's ship, were declared good and lawful prize. By an ordinance of 1704, all articles of the produce and manufacture of the enemy's country, on board of a neutral vessel, were subject to capture, though they did not cause the confiscation of the vessel and of the other parts of the cargo, which the carrying of enemy's property still continued to do. The peculiar provisions of this ordinance, like the French decrees and British Orders in Council of the present century, of which neutral nations were the victims, were attempted to be justified as retaliatory measures; England and Holland, with whom France was at war, having by the convention of 22d August, 1689, which was renewed in the war of the Spanish Succession, not only declared all articles of the produce and manufacture of France liable to

tain articles called contraband of war. The almost unanimous authority of elementary writers, of prize ordinances, and of

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seizure in neutral vessels, but subjected the rest of the cargo, as well as the vessel, to be confiscated. In 1744, the ordinance of 1681 was so far modified that the carrying of enemy's goods did not confiscate the neutral vessel or the rest of the cargo, but enemy's goods, as well as articles of the produce and manufacture of the enemy's country, in neutral vessels, were still liable to confiscation.

The treaty of February 6, 1778, between the United States and France, adopting the principle *free ships free goods*, was extended by an ordinance of July 26, 1778, to all neutrals, but it contained a provision for returning to the old law, if the enemies of France did not recognize the same rule, and the neutral powers suffered it to be violated. The ordinance was in fact suspended, with respect to the United Provinces, from 14th January, 1779, to 22d April, 1780. As the ordinance of 1681 governed in those cases, for which that of 1778 had made no provision, neutral goods, on board of enemy ships continued to be subject to confiscation. The principle that free ships make free goods has, since the American war, been the generally recognized rule of French maritime law, though it was, not unfrequently, violated by the revolutionary governments. The national assembly, by a decree of 14th February, 1793, continued in force the existing laws as to prizes, until otherwise ordered, though by a decree of May 9, of the same year, in consequence of the course of the British government, enemy's property on board of neutral vessels was made liable to confiscation. From the operation of this order the United States were, on the 1st of July, declared to be excepted on account of their treaty of 1778, as were likewise, subsequently, Sweden and Denmark, and all others who had treaties with France consecrating the rights of the neutral flag. The Government of the Directory considered the treaty of 1794, between the United States and Great Britain, as a hostile act, on the part of America, towards France, and taking advantage of one of the articles of the treaty of 1778, by which it was declared that any favors granted by the one party to a foreign nation should become common to the other, it was declared by the decree of 12 Ventose, year 5, (2 March, 1797,) that the French had acquired by reason of the treaty with England, the right of taking enemy's property in American vessels. The United States, on their part, by an act of Congress of July 7, 1798, declared themselves, in consequence of the violation of the existing treaties by France, and her refusal to make reparations for injuries, or to negotiate respecting them, freed from their stipulations. After some acts of reprisal, authorized by the laws of the United States, the provision respecting "free ships free goods," as contained in the treaty of 1778, was renewed in the treaty of 1800, with a declaration, at the time of the exchange of ratifications, on which the claims of American citizens on their own government for spoliations anterior to its date are founded, of a renunciation of the indemnities mutually due or claimed growing out of the preceding treaties.

A law of 29 Nivose, year 6, (18 January, 1798,) declared good prize every neutral vessel laden with enemy's goods, coming from England or her possessions. This was abrogated by the law of 23 Frimaire, year 8, (14 December, 1799,) and a decree was issued on 20th December, 1799, after the accession of Bonaparte, as First Consul, restoring the laws and usages of the monarchy, as they were in

treaties, agrees to enumerate among these all warlike instruments, or materials by their own nature fit to be used in war.

1778, in regard to neutrals. The report of the Minister of Foreign Affairs to the Emperor Napoleon, of March 10, 1812, commences by declaring that the maritime rights of neutrals were solemnly recognized by the treaty of Utrecht, which, it assumes, had become the common law of nations. That the flag covers the property, — that goods under a neutral flag are neutral, and that goods under the enemy's flag are enemy's goods, are among the principles recited.

The disregard by England and France of all international rights, from the rupture consequent on the peace of Amiens to the end of the general European war in 1815, by orders and decrees professedly retaliatory of each other, and which sacrificed all neutral powers to their conflicting belligerent pretensions, have been disavowed by both, as constituting precedents for the future conduct of nations. So far as England is concerned, all claims of the United States for indemnity were merged in the war of 1812, induced by a violation of our neutral rights both as regards persons and property; while, in the case of France, as well as of Spain, Denmark, and Naples, whose illegal edicts were, in general, based on those of France, adequate indemnities were paid to the American government, under conventions to that effect, and distributed to the citizens aggrieved. Turkey, the ally or protegée in the present contest of England and France, has done much to vindicate a claim to be received within the pale of international law, by the respect which she has ever evinced for the immunity of the flag. The other maritime powers of Europe have, especially since the armed neutrality of 1780, to which most of them became parties, conformed their internal ordinances, when not under the controlling influence of the dominant States, to the principles, so generally adopted in their commercial conventions. Russia, during the exceptional period of the French Revolution, especially in 1793 and 1801, deviated widely from that system, of which it was the glory of Catharine II. to have been the champion, and which is now sanctioned, and even extended beyond what was established in the respective conventions of armed neutrality, by her great belligerent adversaries. See Hautefeuille, Droit des Nations Neutres, tom. iii. pp. 254–279. Martens, Recueil de Traités, Supplement, tom. v. p. 530. Ortolan, Diplomatie de la Mer, liv. iii. ch. 5, t. ii. p. 140. Annual Reg. 1800, p. 55. United States Statutes at Large, vol. i. p. 578. Id. vol. viii. pp. 26, 192. Cong. Doc. 19 Cong. 1 Sess. Senate, No. 102, Ex. Doc.

Though following England in the recognition by their executive government, as well as by their tribunals of a different principle, as the rule of international law, independently of conventional arrangements, the United States, who, as belligerents, in 1781, declared their adhesion to the first armed neutrality, have always endeavored to incorporate the principle of free ships free goods in their treaties. This was done in those with France of 1778 and 1800, (neither of which is now in force,) with the United Provinces in 1782, with Sweden in 1783, 1816, and 1827, with Prussia in 1785; and although the rule was suspended in the treaty of 1799 with the last power, it was revived in that of 1828. United States Statutes at Large, vol. viii., passim.

In no case has a treaty been concluded by the United States, sustaining a dif-

Beyond these, there is some difficulty in reconciling the conflicting authorities derived from the opinions of public jurists, the

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ferent principle, except the one of 1794, with England, already noticed, and which expired before the war of 1812, while in the next year, 1795, a treaty was negotiated with Spain, making free ships free goods, without including the usual accompanying provision, that enemy ships make enemy goods. The embarrassments, however, arising from a different rule, as to the two belligerents, when one of the contracting parties is at war with a third power, and the other neutral, induced, in 1819, a change in the treaty to the effect, that the flag of the neutral should only cover the property of an enemy, whose government acknowledged the principle. The rule thus modified has since been applied in our treaties with the other American States, viz., in that of 1824 with Columbia, of 1828 with Brazil, of 1825 with Central America, of 1832 with Chili, of 1831 with Mexico, of 1833 with Peru-Bolivia, and of 1836 with Venezuela. United States Statutes at Large, vol. viii. pp. 262, 312, 393, 328, 437, 490, 472.

Recurring to their respective systems, as understood previous to the present war, it is very evident, that if two nations situated like England and France, one possessing the largest military marine in the world, and the other a navy only inferior to that of its ally, were as co-belligerents, each to maintain its own peculiar principles of maritime law, neutral commerce must altogether cease. Neutral property, which England would not condemn for being found in an enemy's vessel, would be good prize to the French cruiser; while the neutral ship, whose flag was a protection against France, would be subject to be searched by English officers for enemy's property, the mere suspicion of having which on board might induce the sending of the vessel into an English port, and thus breaking up a voyage, for which any allowance, either as freight or for damages, would be a very inadequate indemnity. A compromise of principles was necessary to the coöperation of the navies of the allies. And this, instead of further aggravating the difficulties to which war always subjects neutrals, has been effected by an abandonment of the obnoxious pretensions of England, as a consideration for obtaining from France additional concessions, on her part.

The Ministers of England and France communicated to the Secretary of State of the United States, on the 21st April, 1854, the declaration made in the same terms by their governments, on occasion of the commencement of the war, the preceding month, against Russia. That of England was as follows: —

"DECLARATION OF THE QUEEN.

"*Declaration.*

"Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, having been compelled to take up arms in support of an ally, is desirous of rendering the war as little onerous as possible to the powers with whom she remains at peace.

"To preserve the commerce of neutrals from all unnecessary obstruction, her Majesty is willing, for the present, to waive a part of the belligerent rights appertaining to her by the law of nations.

"It is impossible for her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's

fluctuating usage among nations, and the texts of various conventions designed to give to that usage the fixed form of positive

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despatches; and she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade which may be established with an adequate force against the enemy's forts, harbors, or coasts.

"But her Majesty will waive the right of seizing enemy's property laden on board a neutral vessel, unless it be contraband of war.

"It is not her Majesty's intention to claim the confiscation of neutral property, not being contraband of war, found on board enemies' ships; and her Majesty further declares, that, being anxious to lessen as much as possible the evils of war, and to restrict its operations to the regularly organized forces of the country, it is not her present intention to issue letters of marque for the commissioning of privateers.

"*Westminster*, March 28, 1854."

Mr. Marcy, in acknowledging, on the 28th of April, the note of Mr. Crampton, with its inclosure, says:

"The undersigned has submitted those communications to the President, and received his direction to express to her Majesty's government his satisfaction that the principle that free ships make free goods, which the United States have so long and so strenuously contended for as a neutral right, and in which some of the leading powers of Europe have concurred, is to have a qualified sanction by the practical observance of it in the present war by both Great Britain and France — two of the most powerful nations of Europe.

"Notwithstanding the sincere gratification which her Majesty's declaration has given to the President, it would have been enhanced if the rule alluded to had been announced as one which would be observed not only in the present, but in every future war in which Great Britain shall be a party. The unconditional sanction of this rule by the British and French governments, together with the practical observance of it in the present war, would cause it to be henceforth recognized throughout the civilized world as a general principle of international law. This government, from its very commencement, has labored for its recognition as a neutral right. It has incorporated it in many of its treaties with foreign powers. France, Russia, Prussia, and other nations, have, in various ways, fully concurred with the United States in regarding it as a sound and salutary principle, in all respects proper to be incorporated in the law of nations.

"The same consideration which has induced her Britannic Majesty, in concurrence with the Emperor of the French, to present it as a concession in the present war, the desire 'to preserve the commerce of neutrals from all unnecessary obstruction,' will, it is presumed, have equal weight with the belligerents in any future war, and satisfy them that the claims of the principal maritime powers, while neutral, to have it recognized as a rule of international law, are well founded, and should be no longer contested.

"To settle the principle that free ships make free goods, except articles contraband of war, and to prevent it from being called again in question from any quarter, or under any circumstances, the United States are desirous to unite with

law. Grotius, in considering this subject, makes a distinction between those things which are useful only for the purposes of

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other powers in a declaration that it it shall be observed by each, hereafter, as a rule of international law."

An answer, in the same terms, was addressed to the Count de Sartiges.

On the 9th of May, 1854, Mr. Crampton transmitted to Mr. Marcy the two orders in council of the 15th of April, before referred to. Supra, pp. 372, 390. One of them enlarges the time for the departure of Russian vessels; the other, after reciting and confirming the royal declaration of the 28th of March, still further extends the privileges accorded to neutrals:

"It is this day ordered, by and with the advice of her privy council, that all vessels under a neutral or friendly flag, being neutral or friendly property, shall be permitted to import into any port or place in her Majesty's dominions all goods and merchandise, whatsoever, to whomsoever the same may belong; and to export from any port or place in her Majesty's dominions, to any port, not blockaded, any cargo or goods not being contraband of war, or not requiring a special permission, to whomsoever the same may belong.

"And her Majesty is further pleased, by and with the advice of her privy council, to order, and it is hereby further ordered, that, save and except only as aforesaid, all the subjects of her Majesty and the subjects or citizens of any neutral or friendly State shall and may, during and notwithstanding the present hostilities with Russia, freely trade with all ports and places, wheresoever situate, which shall not be in a state of blockade, save and except that no British vessel shall, under any circumstances whatsoever, either under or by virtue of this order or otherwise, be permitted or empowered to enter or communicate with any port or place which shall belong to or be in the possession or occupation of her Majesty's enemies." Cong. Doc. 33 Cong. 1st Sess. H. of R., Ex. Doc. No. 103.

The articles requiring a special permission to export are confined to arms, munitions, and marine machinery, which may be available in war, and the total prohibition to export them, contained in the order in council of 18th of February, 1854, in anticipation of hostilities, was subsequently modified, as is hereafter stated. See infra, § 24, note.

Whatever doubts may have existed as to the permanent character of the modifications in the principles of international law, adopted, during the present war, by England, would seem to be removed by the subsequent explanations given in Parliament, by a minister of the crown, (Sir W. Molesworth,) speaking avowedly in behalf of the government. In a debate, on the 4th of July, in answer to Mr. J. Phillimore, who had moved a resolution that, however, from the peculiar circumstances of this war, a relaxation of the principle that the goods of an enemy in the ship of a friend are lawful prize may be justifiable, to renounce or surrender the right would be inconsistent with the security and honor of the country.

Sir W. Molesworth said, the resolution raised two distinct questions — one a practical question of political expediency; the other a theoretical question of international law, as to the rights of the subjects of neutral States, with reference to belligerents. The expediency of relaxing the principles that the goods of an

war, those which are not so, and those which are susceptible of indiscriminate use in war and peace. The *first*, he agrees with

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enemy in the ship of a friend might be confiscated, had been admitted by Mr. Phillimore from the peculiar circumstances of this war; but he, (Sir William,) denied that the position of that honorable member, that the right to confiscate an enemy's goods on board a friend's ship was on principle maintainable, was indisputably true; and he disputed the validity of the authorities he had cited, contending that all the best modern publicists dissented from the old authorities, and supported the rule 'free ships free goods.' Sir William developed and discussed at considerable length the arguments urged by the friends of the extension of neutral rights, who maintained that a belligerent had no more right to enter a neutral ship to search for enemy's goods than to enter a neutral port for that purpose, and that so long as an independent sovereign was at peace with a belligerent power, the latter had no right to ask any questions as to articles on board the ships of subjects of the neutral sovereign. So far from the principle contended for by Mr. Phillimore being indisputably true, he insisted that it was demonstrably false, and he appealed to bilateral treaties concluded between this country and the maritime powers of Western Europe; from that of 1654 with Portugal, which recognized as a rule of amicable intercourse that free ships make free goods, which rule was all but invariable during the last two centuries, although it had not always been observed in practice. Even if reasonable doubts might be entertained upon the question, the House ought not to pledge itself to an assertion of the right contended for, and he insisted that there was no logical connection between the rules, 'free ships free goods,' and 'enemy's ships enemy's goods,' which were placed in juxtaposition as a mere verbal antithesis. Sir William then discussed the practical question, arguing that it was wise and expedient to waive, in conjunction with France, our belligerent rights; and a rule of maritime warfare has been adopted by a mutual compromise between the two countries. Assuming that the position of Mr. Phillimore was true, the House, he contended, ought not to agree to this abstract resolution, unless some practical benefit would result from its adoption. None had been shown, and the waiving a right, if it existed, was no renunciation or surrender of it. He moved the previous question. For the debate at large see Appendix.

A reference has been, heretofore, made to the course of the Russian government, on occasion of the declaration of war, in October, 1853, by Turkey, as respects Turkish vessels in Russian ports. At the same time it was declared that, as the Ottoman Porte had not excepted their merchant marine from the rigors authorized by war, Russian cruisers were authorized to capture Turkish vessels, which, as well as their cargoes, even if they belonged to neutral nations, were declared to be good prizes. Neutral vessels were to enjoy the same freedom of navigation, during the war, as before. Avis du Ministre des Finances, le 25 Octobre, 1853. Annuaire, &c., 1853–4, App. p. 926.

Russia, when the war extended to England and France, promulgated decrees, declaring that enemy's goods in neutral vessels would be regarded as inviolable, and might be imported, and that subjects of enemy powers, on board of neutral vessels, would not be molested. Vide supra, Part IV. c. 1, § 11, note, p. 373.

all other text writers in prohibiting neutrals from carrying to the enemy, as well as in permitting the *second* to be so carried; the

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Mr. Marcy, in writing, May 9, 1854, to Mr. Seymour, the Minister of the United States at St. Petersburg, after referring to the communications of the French and English ministers, says:

"It is the settled purpose of this government to pursue such a course, during the present war in Europe, as will give no cause to either belligerent party to complain, and it sincerely hopes neither will give this country any ground for dissatisfaction.

"The danger of a misunderstanding is much less with Russia than with Great Britain and France. I believe, however, these latter powers are desirous to pursue a fair and liberal course towards neutrals, and particularly towards the United States.

"You will observe that there is a suggestion in the inclosed for a convention among the principal maritime nations to unite in the declaration that free ships should make free goods, except articles contraband of war. This doctrine has had heretofore the sanction of Russia, and no reluctance is apprehended on her part to becoming a party to such an arrangement. Great Britain is the only considerable power which has heretofore made a sturdy opposition to it. Having yielded it for the present in the existing war, she thereby recognizes the justice and fairness of the principle, and would hardly be consistent if she should withhold her consent to an agreement to have it hereafter regarded as a rule of international law. I have thrown out the suggestion to Great Britain and France to adopt this as a rule to be observed in all future wars. The President may instruct me to make the direct proposition to these and other powers. Should Russia, Great Britain, and France concur with the United States in declaring this to be the doctrine of the law of nations, I do not doubt that the other nations of the world would at once give their consent and conform their practice to it. If a fair opportunity should occur, the President requests you to ascertain the views of his Majesty, the Emperor of Russia, on the subject.

"The decisions of admiralty courts, in this and other countries, have frequently affirmed the doctrine that a belligerent may seize and confiscate enemy's property found on board of a neutral vessel; the general consent of nations, therefore, is necessary to change it. This seems to be a most favorable time for such a salutary change. From the earliest period of this government, it has made strenuous efforts to have the rule that free ships make free goods, except contraband articles, adopted as a principle of international law; but Great Britain insisted on a different rule. These efforts, consequently, proved unavailing; and now it cannot be recognized, and a strict observance of it secured, without a conventional regulation among the maritime powers. This government is desirous to have all nations agree in a declaration that this rule shall hereafter be observed by them respectively, when they shall happen to be involved in any war, and that, as neutrals, they will insist upon it as a neutral right. In this the United States are quite confident that they will have the cordial consent and coöperation of Russia." Cong. Doc. 33 Cong. 1 Sess. H. of Rep., Ex. Doc. No. 103.

third class, such as money, provisions, ships, and naval stores, he sometimes prohibits, and at others permits, according to the existing circumstances of the war.[1] Vattel makes somewhat of

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The two principles of "free ships free goods," and freedom of neutral property in an enemy's vessel, from capture and confiscation, except it be contraband of war, are established, with a view to their adoption as permanent and immutable, in a treaty concluded at Washington, on 22d of July, 1854, by Mr. Marcy, Secretary of State of the United States, and Mr. de Stoeckl, Chargé d'Affaires of Russia, of which the following are the principal articles: —

"ARTICLE 1. The two high contracting parties recognize as permanent and immutable the following principles, to wit:

"1. That free ships make free goods — that is to say, that the effects or goods belonging to subjects or citizens of a power or State at war are free from capture and confiscation when found on board of neutral vessels, with the exception of articles contraband of war.

"2. That the property of neutrals on board an enemy's vessel is not subject to confiscation, unless the same be contraband of war. They engage to apply these principles to the commerce and navigation of all such powers and States as shall consent to adopt them, on their part, as permanent and immutable.

"ARTICLE 2. The two high contracting parties reserve themselves to come to an ulterior understanding, as circumstances may require, with regard to the application and extension to be given, if there be any cause for it, to the principles laid down in the first article. But they declare from this time that they will take the stipulations contained in said article first as a rule, whenever it shall become a question, to judge of the rights of neutrality.

"ARTICLE 3. It is agreed by the high contracting parties that all nations which shall or may consent to accede to the rules of the first article of this convention, by a formal declaration stipulating to observe them, shall enjoy the rights resulting from such accession as they shall be enjoyed and observed by the two powers signing this convention. They shall mutually communicate to each other the results of the steps which may be taken on the subject." Washington Union.

The conclusion of this treaty was announced, in President Pierce's message, at the commencement of the Session of 1854–5. "It further states that a proposition for treaties, on the same basis, has been submitted to the governments of Europe and America, and that no objection has been taken to the proposed stipulations; but, on the contrary, they are acknowledged to be essential to the security of neutral commerce; and the only apparent obstacle to their general adoption is in the possibility that it may be incumbered by inadmissible conditions." President's Message, 1854–5.]

[1] "Sed et quæstio incidere solet quid liceat in eos qui hostes non sunt, aut dici nolunt, sed hostibus res aliquas subministrant. Nam et olim et nuper de eâ re acriter certatum scimus, cùm alii belli rigorem, alii commerciorum libertatem defenderent.

"Primum distinguendum inter res ipsas. Sunt enim quæ in bello tantùm usum habent, ut arma: sunt quæ in bello nullum habent usum, ut quæ voluptati inser-

a similar distinction, though he includes timber and naval stores among those articles which are particularly useful for the purposes of war, and are always liable to capture as contraband; and considers provisions as such only under certain circumstances, "when there are hopes of reducing the enemy by famine."[1] Bynkershoek strenuously contends against admitting into the list of contraband articles those things which are of promiscuous use in peace and in war. He considers the limitation assigned by Grotius to the right of intercepting them, confining it to the case of necessity, and under the obligation of restitution or indemnification, as insufficient to justify the exercise of the right itself. He concludes that the materials out of which contraband articles may be formed, are not themselves contraband; because if all the materials may be prohibited, out of which something may be fabricated that is fit for war, the catalogue of contraband goods will be almost interminable, since there is hardly any kind of material out of which something, at least, fit for war may not be fabricated. The interdiction of so many articles would amount to a total interdiction of commerce, and might as well be so expressed. He qualifies this general position by stating, that it may sometimes happen that materials for

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viunt: sunt quæ in bello et extra bellum usum habent, ut pecuniæ, commeatus, naves, et quæ navibus adsunt. In primo genere verum est dictum Amalasuinthæ ad Justinianum, in hostium esse partibus qui ad bellum necessaria hosti administrat. Secundum genus querelam non habet. . . . . In tertio illo genere usûs ancipitis distinguendus erit belli status. Nam si tueri me non possum nisi quæ mittuntur intercipiam, necessitas, ut alibi exposuimus, jus dabit, sed sub onere restitutionis, nisi causa alia accedat. Quod si juris mei exsecutionem rerum subvectio impedierit, idque scire potuerit qui advexit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax exspectabatur, tenebitur ille mihi de damno culpa dato, ut qui debitorem carceri exemit, aut fugam ejus in meam fraudem instruxit: et ad damni dati modum res quoque ejus capi, et dominium earum debiti consequendi causâ quæri poterit. Si damnum nondum dederit sed dare voluerit, jus erit rerum retentione eum cogere ut de futuro caveat obsidibus, pignoribus, aut alio modo. Quod si præterea evidentissima sit hostis mei in me injustitia, et ille eum in bello iniquissimo confirmet, jam non tantùm civiliter tenebitur de damno, sed et criminaliter, ut is qui judici imminenti reum manifestum eximit: atque eo nomine licebit in eum statuere quod delicto convenit, secundum ea quæ de pœnis diximus, quare intra eum modum etiam spoliari poterit." Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 1, § v. 1, 2, 3.

[1] Vattel, Droit des Gens, liv. iii. ch. 7, § 112.

building ships are prohibited, "if the enemy is in great need of them, and cannot well carry on the war without them." On this ground, he justifies the edict of the States-General of 1657 against the Portuguese, and that of 1652 against the English, as exceptions to the general rule that materials for ship-building are not contraband. He also states that "provisions are often excepted" from the general freedom of neutral commerce "when the enemies are besieged by our friends, or are *otherwise* pressed by famine." [1]

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[1] "Grotius, in eo argumento occupatus, distinguit inter res, quæ in bello usum habent, et quæ nullum habent, et quæ promiscui usûs sunt, tam in bello, quàm extra bellum. Primum genus non hostes hostibus nostris advehere prohibet, secundum permittit, tertium nunc prohibet, nunc permittit. Si sequamur, quæ *capite præcedenti* disputata sunt, de primo et secundo genere non est, quod magnopere laboremus. In tertio genere distinguit Grotius, et permittit res promiscui usûs intercipere, sed in casu necessitatis, si aliter me meaque tueri non possim, et quidem sub onere restitutionis. Verùm, ut alia præteream, quis arbiter erit ejus necessitatis, nam facillimum est eam prætexere? an ipse ego, qui intercepi? Sic, puto, ei sedet, sed in causâ meâ me sedere judicem omnes leges omniaque jura prohibent, nisi quod usus, Tyrannorum omnium princeps, admittat, ubi fœdera inter Principes explicanda sunt. Nec etiam potui animadvertere, mores Gentium hanc Grotii distinctionem probasse; magis probarunt, quod deinde ait, neque obsessis licere res promiscui usûs advehere, sic enim alteri prodessam in necem alterius, ut latius intelliges ex *Capite seq.* Quòd autem ipse ille Grotius tandem addit, distinguendum esse inter belli justitiam et injustitiam, ad Fœderatos, certo casu, pertinere posse, sed ad eos, qui, neutrarum partium sunt, nunquam pertinere *Capite præced.* mihi visus sum probasse.

. . . . "Ex his fere intelligo, *contrabanda* dici, quæ uti sunt, bello apta esse possunt, nec quicquam interesse, an et extra bellum usum præbeant. Paucissima sunt belli instrumenta, quæ non et extra bellum præbeant usum sui. Enses gestamus ornamenti causâ, gladiis animadvertimus in facinorosos, et ipso pulvere bellico utimur pro oblectamento, et ad testandam publicè lætitiam, nec tamen dubitamus, quin ea veniant nomine τῶν *contrabande Waren*. De his, qui promiscui usûs sunt, nullus disputandi esset finis, et nullus quoque, si de necessitate sequimur Grotii sententiam, et varias, quas adjicit, distinctiones. Excute pacta Gentium, quæ diximus, excute et alia quæ alibi exstant, et reperies, omnia illa appellari *contrabanda*, quæ, uti hostibus suggeruntur, bellis gerendis inserviunt, sive instrumenta bellica sint, sive materia per se bello apta: nam quod Ordines Generales 6 Maj. 1667, contra Suecos decreverunt, etiam materiam, bello non aptam, sed quæ facilè bello aptari possit, pro *contrabanda* esse habendam, singularem rationem habebat, ex jure nempe retorsionis, ut ipsi Ordines in eo decreto significant.

"Atque ante judicabis, an ipsa materia rerum prohibitarum quoque sit prohibita? Et in eam sententiam, si quid tamen definiat, proclivior esse videtur

Valin and Pothier both concur in declaring that provisions (*munitions de bouche*) are not contraband by the prize law of France, or the common law of nations, unless in the single case where they are destined to a besieged or blockaded place.[1]

Naval stores, how far contraband.

Valin, in his commentary upon the marine ordinance of Louis XIV., by which only munitions of war were declared to be contraband, says: — "In the war of 1700, pitch and tar were comprehended in the list of contraband, because the enemy treated them as such, except when found on board Swedish ships, these articles being of the growth and produce of their country. In the treaty of commerce concluded with the King of Denmark, by France, the 23d of August, 1742, pitch and tar were also declared contraband, together with resin, sail-cloth, hemp and cordage, masts, and ship-timber. Thus, as to this matter, there is no fault to be found with the conduct of the English, except where it contravenes particular treaties; for in law these things are now contraband, and have been so since the beginning of the present century, which was not the case formerly, as it appears by ancient treaties, and particularly that of St. Germain, concluded with England in 1677; the fourth

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Zocchius, *de Jure Feciali*, Part II. sect. vii. Q. 8. Ego non essem, quia ratio et exempla me moveant in contrarium. Si omnem materiam prohibeas, ex quâ quid bello aptari possit, ingens esset catalogus rerum prohibitarum, quia nulla fere materia est, ex quâ non saltem aliquid, bello aptum, facilè fabricemus. Hâc interdictâ, tantum non omni commercio interdicimus, quod valde esset inutile. Et § 4, Pacti 1 Dec., 1674, inter Carolum II., Angliæ Reg. et Ordines Generales; et § 4, Pacti 26 Nov., 1675, inter Regem Suecorum et Ordines Generales; et § 16, Pacti 12 Oct., 1679, inter eosdem, amicos hostibus quibis arma non licet, permittunt advehere ferrum, æs, metallum, materiam navium, omnia denique quæ ad usum belli parata non sunt. Quandoque tamen accidit, ut et navium materia prohibeatur, si hostis eâ quàm maxime indigeat, et absque eâ commode bellum gerere haud possit. Quum Ordines Generales, in § 2, edicti contra Lysitanos, 31 Dec., 1657, iis, quæ communi Populorum usu *contrabanda* censentur, Lysitanos juvari vetuissent, specialiter addunt in § 3, ejusdem edicti, quia nihil nisi mari a Lysitanis metuebant, ne quis etiam navium materiam iis advehere vellet, palam sic navium materia a *contrabandis* distincta sed ob specialem rationem addita. Ob eandem causam navium materia conjungitur cum instrumentis belli in § 2, edicti contra Anglos, 5 Dec., 1652, et in edicto Ordinum Generalium contra Francos, 9 Mart., 1689. Sed sunt hæ exceptiones, quæ regulam confirmant." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 10.

[1] Valin, Comment. sur l'Ordon. liv. iii. tit. 9. Des Prises, art. 11. Pothier, de Propriété, No. 104.

article of which expressly provides that the trade in all these articles shall remain free, as well as in every thing necessary to human nourishment, with the exception of places besieged or blockaded."[1]

In the famous case of the Swedish convoy, determined in the English Court of Admiralty, in 1799, Sir W. Scott (Lord Stowell) states, "that tar, pitch, and hemp, going to the enemy's use, are liable to be seized as contraband in their own nature, cannot, I conceive, be doubted under the modern law of nations; though formerly, when the hostilities of Europe were less naval than they have since become, they were of a *disputable nature*, and perhaps continued so at the time of making that treaty," (that is, the treaty of 1661, between Great Britain and Sweden, which was still in force when he was pronouncing this judgment,) "or at least at the time of making that treaty which is the basis of it, I mean the treaty in which Whitlock was employed in 1656; for I conceive that Valin expresses the truth of this matter when he says: 'De *droit* ces choses,' (speaking of naval stores,) 'sont de contrabande aujourd'hui et depuis le commencement de ce siècle, ce qui n'etoit pas autrefois néanmoins;' — and Vattel, the best recent writer upon these matters, explicitly admits amongst positive contraband, 'les bois, et tout ce qui sert à la construction et à l'armement de vaisseaux de guerre.' Upon this principle was founded the modern explanatory article of the Danish treaty, entered into in 1780, on the part of Great Britain by a noble lord (Mansfield) then Secretary of State, whose attention had been peculiarly turned to subjects of this nature. I am, therefore, of opinion, that, although it might be shown that the nature of these commodities had been subject to some controversy in the time of Whitlock, when the fundamental treaty was constructed, and therefore a discreet silence concerning them was observed in the composition of that treaty, and of the latter treaty derived from it, yet that the exposition which the later judgment and practice of Europe had given upon this subject would, in some degree, affect and supply what the treaties had been content to leave on that indefinite and disputable foot-

[1] Valin, Comm. sur l'Ordonn. liv. iii. tit. 9. Des Prises, art. 11.

ing, on which the notions then more generally prevailing in Europe had placed it."[1]

It seems difficult to read the treaties of 1656 and 1661, between Great Britain and Sweden, as fairly admitting the interpretation placed upon them in the above cited judgment. These treaties, together with those subsequently concluded between the same powers in 1664 and 1665, all enumerate coined money, provisions, and munitions of war, as contraband between the contracting parties; and the *discreet silence* referred to by Lord Stowell is sufficiently supplied by the treaties of 1664 and 1665, which expressly declared, that "where one of the parties shall find itself at war, commerce and navigation shall be free for the subjects of that power which shall not have taken any part in it with the enemies of the other; and that they shall, consequently, be at liberty to carry to them directly all the articles which are not specially excepted by the 11th article of the treaty concluded at London in 1661, nor by virtue of this same article expressly declared prohibited or contraband, or which are not enemy's property." The following article is still more explicit. "And to the end that it may be known to all those who shall read these presents, what are the goods especially excepted and prohibited, or regarded as contraband, it has appeared fit to enumerate them here according to the aforesaid 11th article of the Treaty of London. These goods specially designated are the following," &c. Here follows the enumeration, as in the 11th article, which makes no mention of naval stores.[2]

This view seems to be confirmed by the opinion given, in 1674, by Sir Leoline Jenkins, to King Charles II., in the case of a cargo of naval stores, the produce of Sweden, belonging to an English subject, taken on board a Swedish vessel, and carried into Ostend by a Spanish privateer. "There is not any pretence to make the pitch and tar belonging to your Majesty's subjects to be contraband; these commodities not being enumerated in the 24th article of the treaty made between your Majesty and the crown of Spain, in the year 1667, are consequently declared

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[1] Robinson's Adm. Rep. vol. i. p. 372. The Maria.

[2] Schlegel, Examen de la Sentence prononcée par le tribunal d'Amirauté Anglaise, le 11 Juin 1799, dans l'affaire du convoi Suédois, p. 125.

not to be contraband in the article next following. The single objection that seems to lie against the petitioner in this case is, that this tar and pitch is found laden, not in an English, but a Swedish bottom, as by the proofs and documents on board it doth appear; and, consequently, that the benefit of those articles in the Spanish Treaty cannot be claimed here, since they are in favor of our trade in those commodities that shall be found laden in our own, not in foreign bottoms. But it is not probable that Sweden hath suffered or allowed, in any treaty of theirs with Spain, that their own native commodities, pitch and tar, should be reputed contraband. These goods, therefore, if they be not made unfree by being found in an unfree bottom, cannot be judged by any other law than by the general law of nations; and then I am humbly of opinion, that nothing ought to be judged contraband by that law in this case, except it be in the case of besieged places, or of a general notification made by Spain to all the world, that they will condemn all the pitch and tar they meet with. So that, upon the whole, your Majesty's gracious intercession for, and protection to the petitioner in his claim, will be founded, not upon the equity and the true meaning of your Majesty's treaty with Spain, but upon the general law and practice of all nations."[1]

By the treaty of navigation and commerce of Utrecht, between Great Britain and France, renewed and confirmed by the Treaty of Aix-la-Chapelle, in 1748, by the Treaty of Paris, in 1763, by that of Versailles, in 1783, and by the commercial treaty between France and Great Britain, of 1786, the list of contraband is strictly confined to munitions of war; and naval stores, provisions, and all other goods which have not been worked into the form of any instrument or furniture for warlike use, by land or by sea, are expressly excluded from this list. The subject of the contraband character of naval stores continued a vexed question between Great Britain and the Baltic powers, throughout the whole of the eighteenth century. Various relaxations of the extreme belligerent pretensions on this subject had been conceded in favor of the commerce, in articles the peculiar growth and production of these States, either by permitting them to be

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[1] Life and Correspondence of Sir L. Jenkins, vol. ii. p. 751.

freely carried to the enemy's ports, or by mitigating the original penalty of confiscation, on their seizure, to the milder right of preventing the goods being carried to the enemy, and applying them to the use of the belligerent, on making a pecuniary compensation to the neutral owner. This controversy was at last terminated by the convention between Great Britain and Russia, concluded in 1801, to which Denmark and Sweden subsequently acceded. By the 3d article of this treaty it is declared, "That, in order to avoid all ambiguity in what ought to be considered as contraband of war, his Imperial Majesty of all the Russias and his Britannic Majesty declare, conformably to the 11th article of the treaty of commerce, concluded between the two crowns on the 10th (21st) February, 1797, that they acknowledge as such only the following articles, namely, cannons, mortars, fire-arms, pistols, bombs, grenades, balls, bullets, firelocks, flints, matches, powder, saltpetre, sulphur, helmets, pikes, swords, sword-belts, saddles and bridles; excepting, however, the quantity of the said articles which may be necessary for the defence of the ship and of those who compose the crew; and all other articles whatever, not enumerated here, shall not be considered warlike and naval ammunition, nor be subject to confiscation, and of course shall pass freely, without being subject to the smallest difficulty, unless they be considered as enemy's property in the above settled sense. It is also agreed, that what is stipulated in the present article shall not be to the prejudice of the particular stipulations of one or the other crown with other powers, by which objects of a similar kind should be reserved, provided, or permitted."

The object of this convention is declared, in its preamble, to be the settlement of the differences between the contracting parties, which had grown out of the armed neutrality, by "an invariable determination of their principles upon the rights of neutrality, in their application to their respective monarchies;" which object was accomplished by the northern powers yielding the rule of *free ships free goods*, whilst Great Britain conceded the points asserted by them as to contraband, blockades, and the coasting and colonial trade.

The 8th article of the treaty also declared, that "the principles and measures adopted by the present act, shall be alike applicable to all the maritime wars in which one of the two powers may

be engaged, whilst the other remains neutral. These stipulations shall consequently be regarded as permanent, and shall serve for a constant rule to the contracting powers, in matters of commerce and navigation."

The list of contraband, contained in the convention between Great Britain and Russia, to which Sweden acceded, differed, in some respects, from that contained in the 11th article of the Treaty of 1661, between Great Britain and Sweden. In order to prevent a recurrence of the disputes which had arisen relative to that article, a convention was concluded at London, between these two powers, on the 25th of July, 1803, by which the list of contraband, contained in the convention between Great Britain and Russia, was augmented, with the addition of the articles of coined money, horses, and the necessary equipments of cavalry, ships of war, and all manufactured articles, serving immediately for their equipment, all which articles were subjected to confiscation. It was further stipulated, that all naval stores, the produce of either country, should be subject to the right of preëmption by the belligerent party, upon condition of paying an indemnity of ten per centum upon the invoice price or current value, with demurrage and expenses. If bound to a neutral port, and detained upon suspicion of being bound to an enemy's port, the vessels detained were to receive an indemnity, unless the belligerent government chose to exercise the right of preëmption; in which case, the owners were to be entitled to receive the price which the goods would have sold for at their destined port, with demurrage and expenses.[1]

Provisions and naval stores, when contraband.

The doctrine of the British Prize Courts, as to provisions and naval stores becoming contraband, independently of special treaty stipulations, is laid down very fully by Sir W. Scott, in the case of The Jonge Margaretha. He there states that the catalogue of contraband had varied very much, and sometimes in such a manner as to make it difficult to assign the reason of the variations, owing to particular circumstances, the history of which had not accompanied the history of the decisions. "In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was

[1] Martens, Recueil, tome vii. pp. 150–281.

expressly asserted, by a person of great knowledge and experience in the English admiralty, that, by its practice, *corn*, *wine*, and *oil*, were liable to be deemed contraband. In much later times, many sorts of provisions, such as butter, salted fish, and rice, have been condemned as contraband. The modern established rule was, that generally they are not contraband, but may become so under circumstances arising out of the peculiar situation of the war, or the condition of the parties engaged in it. Among the causes which tend to prevent provisions from being treated as contraband, one is, that they are of the growth of the country which exports them. Another circumstance, to which some indulgence by the practice of nations is shown, is when the articles are in their native and unmanufactured state. Thus iron is treated with indulgence, though anchors and other instruments fabricated out of it are directly contraband. Hemp is more favorably considered than cordage; and wheat is not considered so noxious a commodity as any of the final preparations of it for human use. But the most important distinction is, whether the articles are destined for the ordinary uses of life, or for military use. The nature and quality of the port to which the articles were going, is a test of the matter of fact to which the distinction is to be applied. If the port is a general commercial port, it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. On the contrary, if the great predominant character of a port be that of a port of naval equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final application of an article *ancipitis usûs*, it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed, if, at the time when the articles were going, a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful."[1]

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[1] Robinson's Adm. Rep. vol. i. p. 192.

Articles of promiscuous use becoming contraband, when destined to a port of naval equipment.

The distinction, under which articles of promiscuous use are considered as contraband, when destined to a port of naval equipment, appears to have been subsequently abandoned by Sir W. Scott. In the case of The Charlotte, he states that "the character of the port is immaterial; since naval stores, if they are to be considered as contraband, are so without reference to the nature of the port, and equally, whether bound to a mercantile port only, or to a port of naval military equipment. The consequence of the supply may be nearly the same in either case. If sent to a mercantile port, they may then be applied to immediate use in the equipment of privateers, or they may be conveyed from the mercantile to the naval port, and there become subservient to every purpose to which they could have been applied if going directly to a port of naval equipment." [1]

Provisions becoming contraband under certain circumstances of war.

The doctrine of the English Courts of Admiralty, as to provisions becoming contraband under certain circumstances of war, was adopted by the British government in the instructions given to their cruisers on the 8th June, 1793, directing them to stop all vessels laden wholly or in part with corn, flour, or meal, bound to any port in France, and to send them into a British port, to be purchased by government, or to be released, on condition that the master should give security to dispose of his cargo in the ports of some country in amity with his Britannic Majesty. This order was justified, upon the ground that, by the modern law of nations, all provisions are to be considered contraband, and, as such, liable to confiscation, wherever the depriving an enemy of these supplies is one of the means intended to be employed for reducing him to terms. The actual situation of France (it was said) was notoriously such, as to lead to the employing this mode of distressing her by the joint operations of the different powers engaged in the war; and the reasoning which the text-writers apply to all cases of this sort, was more applicable to the present case, in which the distress resulted from the unusual mode of war adopted by the enemy himself, in having armed almost the whole laboring class of the French nation, for the purpose of

[1] Robinson's Adm. Rep. vol. v. p. 305.

commencing and supporting hostilities against almost all European governments; but this reasoning was most of all applicable to a trade, which was in a great measure carried on by the then actual rulers of France, and was no longer to be regarded as a mercantile speculation of individuals, but as an immediate operation of the very persons who had declared war, and were then carrying it on against Great Britain.[1]

This reasoning was resisted by the neutral powers, Sweden, Denmark, and especially the United States. The American government insisted, that when two nations go to war, other nations, who choose to remain at peace, retain their natural right to pursue their agriculture, manufactures, and other ordinary vocations; to carry the produce of their industry for exchange to all countries, belligerent or neutral, as usual; to go and come freely, without injury or molestation; in short, that the war among others should be, for neutral nations, as if it did not exist. The only restriction to this general freedom of commerce, which has been submitted to by nations at peace, was that of not furnishing to either party implements merely of war, nor any thing whatever to a place blockaded by its enemy. These implements of war had been so often enumerated in treaties under the name of contraband, as to leave little question about them at that day. It was sufficient to say that corn, flour, and meal, were not of the class of contraband, and consequently remained articles of free commerce. The state of war then existing between Great Britain and France furnished no legitimate right to either of these belligerent powers to interrupt the agriculture of the United States, or the peaceable exchange of their produce with all nations. If any nation whatever had the right to shut against their produce all the ports of the earth except her own, and those of her friends, she might shut these also, and thus prevent altogether the export of that produce.[2]

In the treaty subsequently concluded between Great Britain and the United States, on the 19th November, 1794, it was stipulated, (article 18,) that under the denomination of contraband

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[1] Mr. Hammond's Letter to Mr. Jefferson, 12th September, 1793. Waite's State Papers, vol. i. p. 398.

[2] Mr. Jefferson's Letter to Mr. T. Pinkney, 7th September, 1793. Waite's State Papers, vol. i. p. 393.

should be comprised all arms and implements serving for the purposes of war, "and also timber for ship-building, tar or rosin, copper in sheets, sails, hemp, and cordage, and generally whatever may serve directly to the equipment of vessels, unwrought iron and fir planks only excepted." The article then goes on to provide, that "whereas *the difficulty of agreeing on the precise cases, in which alone provisions and other articles, not generally contraband, may be regarded as such*, renders it expedient to provide against the inconveniences and misunderstandings which might thence arise; it is further agreed, that whenever any such articles, so becoming contraband according to the existing law of nations, shall for that reason be seized, the same shall not be confiscated; but the owners thereof shall be speedily and completely indemnified; and the captors, or, in their default, the government under whose authority they act, shall pay to the masters or owners of such vessels the full value of all such articles, with a reasonable mercantile profit thereon, together with the freight, and also the demurrage incident to such detention."

British provision order of April, 1795.

The instructions of June, 1793, had been revoked previous to the signature of this treaty; but, before its ratification, the British government issued, in April, 1795, an Order in Council, instructing its cruisers to stop and detain all vessels, laden wholly or in part with corn, flour, meal, and other articles of provisions, and bound to any port in France, and to send them to such ports as might be most convenient, in order that such corn, &c., might be purchased on behalf of government.

This last order was subsequently revoked, and the question of its legality became the subject of discussion before the mixed commission, constituted under the treaty to decide upon the claims of American citizens, by reason of irregular or illegal captures and condemnations of their vessels and other property, under the authority of the British government. The Order in Council was justified upon two grounds: —

1. That it was made when there was a prospect of reducing the enemy to terms by famine, and that, in such a state of things, provisions bound to the ports of the enemy became so far contraband, as to justify Great Britain in seizing them upon the terms of paying the invoice price, with a reasonable mercantile profit thereon, together with freight and demurrage.

2. That the order was justified by *necessity;* the British nation being at that time threatened with a scarcity of the articles directed to be seized.

The first of these positions was rested not only upon the general law of nations, but upon the above quoted article of the treaty between Great Britain and America.

The evidence adduced of this supposed law of nations was principally the following passage of Vattel: — "Commodities particularly useful in war, and the carrying of which to an enemy is prohibited, are called contraband goods. Such are arms, ammunition, timber for ship-building, every kind of naval stores, horses, and even provisions, in certain junctures, when we have hopes of reducing the enemy by famine."[1]

In answer to this authority, it was stated that it might be sufficient to say that it was, at best, equivocal and indefinite, as it did not designate what the junctures are in which it might be held, that "there are hopes of reducing the enemy by famine;" that it was entirely consistent with it to affirm, that these hopes must be built upon an obvious and palpable chance of effecting the enemy's reduction by this obnoxious mode of warfare, and that no such chance is by the law of nations admitted to exist, except in certain defined cases; such as the actual siege, blockade, or investment of particular places. This answer would be rendered still more satisfactory, by comparing the above quoted passage with the more precise opinions of other respectable writers on international law, by which might be discovered that which Vattel does not profess to explain — the combination of circumstances to which his principle is applicable, or is intended to be applied.

But there was no necessity for relying wholly on this answer, since Vattel would himself furnish a pretty accurate commentary on the vague text which he had given. The only instance put by this writer, which came within the range of his general principle, was that which he, as well as Grotius, had taken from Plutarch. "Demetrius," as Grotius expressed it, "held Attica by the sword. He had taken the town of Rhamnus, *designing a famine in Athens*, and had almost accomplished his design, when a vessel laden with provisions attempted to relieve the city."

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[1] Droit des Gens, liv. iii. ch. 7, § 112.

Vattel speaks of this as of a case in which provisions were contraband, (section 17,) and although he did not make use of this example for the declared purpose of rendering more specific the passage above cited, yet as he mentions none other to which it can relate, it is strong evidence to show that he did not mean to carry the doctrine of special contraband farther than that example would warrant.

It was also to be observed that, in section 113, he states expressly that all contraband goods, (including, of course, those becoming so by reason of the junctures of which he had been speaking at the end of section 112,) are to be confiscated. But nobody pretended that Great Britain could rightfully have *confiscated* the cargoes taken under the order of 1795; and yet if the seizures made under that order fell within the opinion expressed by Vattel, the confiscation of the cargoes seized would have been justifiable. It had long been settled, that all contraband goods are subject to forfeiture by the law of nations, whether they are so in their own nature, or become so by existing circumstances; and even in early times, when this rule was not so well established, we find that those nations who sought an exemption from forfeiture, never claimed it upon grounds peculiar to any description of contraband, but upon general reasons, embracing all cases of contraband whatsoever. As it was admitted, then, that the cargoes in question were not subject to forfeiture as contraband, it was manifest that the juncture which gave birth to the Order in Council could not have been such a one as Vattel had in view; or, in other words, that the cargoes were not become contraband at all within the true meaning of his principle, or within any principle known to the general law of nations.

The authority of Grotius was also adduced, as countenancing this position.

Grotius divides commodities into three classes, the first of which he declares to be plainly contraband; the second plainly not so; and as to the third, he says: — "In tertio illo genere usûs ancipitis, distinguendus erit belli status. Nam si tueri me non possum nisi quæ mittuntur intercipiam, necessitas, ut alibi exposuimus, jus dabit, sed sub onere restitutionis, nisi causa alia accedat." This "causa alia" is afterwards explained by an example, "ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabatur."

This opinion of Grotius, as to the third class of goods, did not appear to proceed at all upon the notion of contraband, but simply upon that of a pure necessity on the part of the capturing belligerent. He does not consider the right of seizure as a means of effecting the reduction of the enemy, but as the indispensable means of our own defence. He does not state the seizure upon any supposed illegal conduct in the neutral, in attempting to carry articles of the third class, (among which provisions are included,) *not bound to a port besieged or blockaded*, to be lawful, when made with the mere view of annoying or reducing the enemy, but solely when made with a view to our own preservation or defence, under the pressure of that imperious and unequivocal necessity, which breaks down the distinctions of property, and, upon certain conditions, revives the original right of using things as if they were in common.

This necessity he explains at large in his second book, (cap. ii. sec. 6,) and, in the above-recited passage, he refers expressly to that explanation. In sections 7, 8, and 9, he lays down the conditions annexed to this right of necessity: as, 1. It shall not be exercised until all other possible means have been used; 2. Nor if the right owner is under a like necessity; and, 3. Restitution shall be made as soon as practicable.

In his third book, (cap. xvii. sec. 1,) recapitulating what he had before said on this subject, Grotius further explains this doctrine of necessity, and most explicitly confirms the construction placed upon the above-cited texts. And Rutherforth, in commenting on Grotius, (lib. iii. cap. 1, sec. 5,) also explains what he there says of the right of seizing provisions upon the ground of necessity; and supposes his meaning to be that the seizure would not be justifiable in that view, "unless the exigency of affairs is such, that we cannot possibly do without them."[1]

Bynkershoek also confines the right of seizing goods, not generally contraband of war, (and provisions among the rest,) to the above-mentioned cases.[2]

It appeared, then, that so far as the authority of text writers could influence the question, the Order in Council of 1795 could

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[1] Rutherforth's Inst. vol. ii. b. ii. ch. 9, § 19.

[2] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 9.

not be rested upon any just notion of contraband; nor could it, in that view, be justified by the reason of the thing or the approved usage of nations.

If the mere hope, however apparently well founded, of annoying or reducing an enemy, by intercepting the commerce of neutrals in articles of provision, (which, in themselves, are no more contraband than ordinary merchandise,) to ports not besieged or blockaded, would authorize that interruption, it would follow that a belligerent might at any time prevent, without a siege or blockade, all trade whatsoever with its enemy; since there is at all times reason to believe that a nation, having little or no shipping of its own, might be so materially distressed by preventing all other nations from trading with it, that such prevention might be a powerful instrument in bringing it to terms. The principle is so wide in its nature, that it is, in this respect, incapable of any boundary. There is no solid distinction, in this view of the principle, between provisions and a thousand other articles. Men must be clothed as well as fed; and even the privation of the conveniences of life is severely felt by those to whom habit has rendered them necessary. A nation, in proportion as it can be debarred its accustomed commercial intercourse with other States, must be enfeebled and impoverished; and if it is allowable to a belligerent to violate the freedom of neutral commerce, in respect to any one article not contraband *in se*, upon the expectation of annoying the enemy, or bringing him to terms by a seizure of that article, and preventing it reaching his ports, why not, upon the same expectation of annoyance, cut off as far as possible by captures, all communication with the enemy, and thus strike at once effectually at his power and resources?

As to the 18th article of the Treaty of 1794, between the United States and Great Britain, it manifestly intended to leave the question where it found it; the two contracting parties, not being able to agree upon a definition of the cases in which provisions and other articles, not generally contraband, might be regarded as such, (the American government insisting on confining it to articles destined to a place actually besieged, blockaded, or invested, whilst the British government maintained that it ought to be extended to all cases where there is an expectation of reducing the enemy by famine,) concurred in stipulating, that "whenever any such articles, so becoming contraband, *according*

to the existing law of nations, shall for that reason be seized, the same shall not be confiscated," but the owners should be completely indemnified in the manner provided for in the article. When the law of nations existing at the time the case arises pronounces the articles contraband, they may for that reason be seized; when otherwise, they may not be seized. Each party was thus left as free as the other to decide whether the law of nations, in the given case, pronounced them contraband or not, and neither was obliged to be governed by the opinion of the other. If one party, on a false pretext of being authorized by the law of nations, made a seizure, the other was at full liberty to contest it, to appeal to that law, and, if he thought fit, to resort to reprisals and war.

As to the second ground upon which the Order in Council was justified, *necessity*, Great Britain being, as alleged at the time of issuing it, threatened with a scarcity of those articles directed to be seized, it was answered that it would not be denied that extreme necessity might justify such a measure. It was only important to ascertain whether that necessity then existed, and upon what terms the right it communicated might be carried into exercise.

Grotius, and the other text writers on the subject, concurred in stating that the necessity must be real and pressing; and that even then it does not confer a right of appropriating the goods of others, until all other practicable means of relief have been tried and found inadequate. It was not to be doubted that there were other practicable means of averting the calamity apprehended by Great Britain. The offer of an advantageous market in the different ports of the kingdom, was an obvious expedient for drawing into them the produce of other nations. Merchants do not require to be forced into a profitable commerce; they will send their cargoes where interest invites; and if this inducement is held out to them in time, it will always produce the effect intended. But so long as Great Britain offered less for the necessaries of life than could have been obtained from her enemy, was it not to be expected that neutral vessels should seek the ports of that enemy, and pass by her own? Could it be said that, under the mere apprehension (not under the actual experience) of scarcity, she was authorized to have recourse to the forcible means of seizing provisions belong-

ing to neutrals, without attempting those means of supply which were consistent with the rights of others, and which were not incompatible with the exigency? After this order had been issued and carried into execution, the British government did what it should have done before; it offered a bounty upon the importation of the articles of which it was in want. The consequence was, that neutrals came with these articles, until at length the market was found to be overstocked. The same arrangement, had it been made at an earlier period, would have rendered wholly useless the order of 1795.

Upon these grounds, a full indemnification was allowed by the commissioners, under the seventh article of the Treaty of 1794, to the owners of the vessels and cargoes seized under the Orders in Council, as well for the loss of a market as for the other consequences of their detention.[1] (*a*)

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[1] Proceedings of the Board of Commissioners under the seventh article of the Treaty of 1794. MS. Opinion of Mr. W. Pinkney, case of The Neptune.

(*a*) [The "declarations" of the French and English governments, at the commencement of the war, except *contraband of war* from the articles, whether they be enemy's property on board of neutral vessels, or neutral property on board of enemy's vessels, to which immunity is accorded. The documents of this period contain no new definition of contraband, unless we are to regard the British Order in Council, of the 18th of February, 1854, issued in anticipation of the declaration of war, as indicative of its views on that subject. By it, "all arms, ammunition, and gunpowder, military and naval stores, and the following articles, being articles which are judged capable of being converted into or made useful in increasing the quantity of military or naval stores; that is to say, *marine engines, screw propellers, paddle wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler plates, fire bars, and every article or any other component part of an engine or boiler, or any article whatsoever, which is, or can, or may, become applicable for the manufacture of marine machinery,* are prohibited either to be exported from the United Kingdom, or carried coastwise." London Gazette.

This order is not in terms a belligerent measure, but purports to be founded on the Customs' Consolidation Act of 1853. The application of it was restricted soon after it was issued, and, by a further modification, on 24th of April, the prohibited articles were reduced to three classes only: namely, 1st. Gunpowder, saltpetre, and brimstone; 2d. Arms and ammunition; and, 3d. Marine engines and boilers, and the component parts thereof. These articles were forbidden to be exported to any port of Europe, north of Dunkirk or of the Mediterranean Sea, east of Malta, without a special permit of the Privy Council. To all other places they might be exported, with the restriction of a bond. It is understood, however, that the permit given in such case is merely an authority to the officers of the customs to allow the export of the articles,

§ 25. Transportation of military persons and despatches.

Of the same nature with the carrying of contraband goods is the transportation of military persons or despatches in the service of the enemy.

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but not a license for their transport at sea, as affecting the law of contraband. We are, therefore, still referred, in determining what may safely be done in this matter by neutrals, to the former usages of the tribunals of the two countries, and to the past decrees and orders of their governments. Destination is essential in a question of contraband; and, consequently, under the existing regulations, the trade in all articles, whether included in that denomination or not, is free to all vessels under a neutral or friendly flag, as long as it is not obnoxious to the suspicion of conveying contraband or prohibited articles to an enemy's port, or indirectly for the enemy's use.

By the French Ordinance of 1681, which is still the rule, it being recognized in the Ordinance of 1778, which abolished the intervening regulations, only arms and ammunition are regarded as contraband; though, during the wars of the French Revolution, all distinctions on this point, as in other matters relating to neutrals, were often practically disregarded. The English rule has varied, as well for those cases in which there were no treaty stipulations, as in their conventional arrangements; their Orders in Council, and admiralty decisions, frequently including naval stores in the permanent list of contraband articles, and, under circumstances, extending the list even to provisions, in some cases absolutely, and in others so far as to authorize their appropriation to the use of the belligerent government, on its paying the value thereof. One of their latest text writers, before the war, defined contraband to be: — "1. Articles which have been constructed, fabricated, or compounded into actual instruments of war; 2. Articles which from their nature, qualities, and quantities, are applicable and useful for the purposes of war; 3. Articles which, although not subservient generally to the purposes of war, such as grain, flour, provisions, naval stores, become so by their special and direct destination for such purposes, namely, by their destination for the supply of armies, garrisons or fleets, naval arsenals and ports of military equipment." Reddie, Researches Historical and Critical in Maritime International Law, vol. ii. p. 456.

It is remarked by publicists, that a mere change of the implements of war can make no difference with regard to the principle of the prohibition, as applied to contraband; and that if the *usus bellici*, as to particular articles, shift, the law shifts with them. No greater change could have occurred in maritime warfare than what has been produced, since the last general war, by the introduction of steam into navigation. In the Order of the 18th of February, 1854, steam engines are classed with naval stores, into which category, when intended for vessels, they properly fall, and whether they are to be considered as contraband, therefore, depends on the rule as to naval stores generally. So far as regards the two great maritime belligerents, there was no greater accordance in their views on this than on other questions, connected with neutral rights; though, as in the case of the flag covering the property, the only treaties between them, which refer to this subject, as is shown in the text, adopt the most liberal rule; and they, moreover, exclude, in express terms, naval stores from the list of contraband.

A neutral vessel, which is used as a transport for the enemy's forces, is subject to confiscation, if captured by

spatches in the enemy's service.

The subject of the introduction, among contraband of war, of steam engines, as well as of coal, as necessary to their use, was discussed even in advance of the present contest, by text writers on the Continent, especially Hautefeuille and Ortolan. The latter objects to the English extension of contraband *ad libitum*, and declares his opinion to be, that, on principle, under ordinary circumstances, arms and munitions of war, which serve directly and exclusively for belligerent purposes, are alone contraband. In his second edition, (1853,) he confines the special cases to certain determinate articles, whose usefulness is greater in war than in peace, and which, from circumstances, are in their character contraband, without being actually arms or munitions of war; such as timber, evidently intended for the construction of ships of war or for gun carriages, boilers or machinery, for the enemy's steam vessels, sulphur and saltpetre, or other materials for arms or munitions of war. He corrects his former opinion, that, with the increased importance of the military steam marine, coal, as indispensable for it, may be included in this class, notwithstanding its great use for industrial and pacific purposes; and denies that, looking to the immense commercial navigation to which it is essential, and to the fact that it can never assume a form, which shows that it is intended for the exclusive use of the military marine, it can ever, under any circumstances, become contraband. Ortolan, Diplomatie de la Mer, liv. iii. ch. 6, tom. ii. p. 206, 2d edit. Hautefeuille, of course, excludes these articles from the contraband list. This is consistent with the principles of his treatise, which admits but one class of contraband, and confines it to objects of first necessity for war, which are exclusively useful in war, and which can be directly employed for that purpose, without undergoing any change; that is to say, to arms and munitions of war. He considers that steam engines are, like sails, the moving powers of a ship, and cannot be distinguished from the other articles which enter into the construction of the vessel; and he deems them, as naval stores, the objects of a free commerce. Hautefeuille, Droits des Gens Neutres, t. ii. p. 412.

The numerous treaties, to which the United States have been parties, which contain any stipulations respecting contraband, with the single exception of that of 1794, with England, confine it to arms and munitions of war; and the early ones exclude naval stores, in express terms, from the list. See U. S. Statutes at Large, vol. viii. *passim*.

A Swedish ordinance of the 8th of April, 1854, issued with reference to the present war, declares: —

"Sec. 5. All kinds of goods, even such as belong to belligerents, may be carried in Swedish ships as neutral, except contraband of war; by which are understood cannons, mortars, all kinds of arms, bombs, grenades, balls, flints, linstocks, gunpowder, saltpetre, sulphur, cuirasses, pikes, belts, cartouch-boxes, saddles, bridles, and all other manufactures (*tillverkningar*) immediately applicable to warlike purposes; herein, however, are not included a stock of such articles necessary for the defence of ship and crew.

"In regard to contraband of war, should any change or addition be made, in consequence of agreement between us and other powers, a separate notice thereof shall be proclaimed." Public Documents.

the opposite belligerent. Nor will the fact of her having been impressed by violence into the enemy's service, exempt her. The master cannot be permitted to aver that he was an involuntary agent. Were an act of force exercised by one belligerent power on a neutral ship or person to be considered a justification for an act, contrary to the known duties of the neutral character, there would be an end of any prohibition under the law of nations to carry contraband, or to engage in any other hostile act. If any loss is sustained in such a service, the neutral yielding to such demands must seek redress from the government which has imposed the restraint upon him.[1] As to the number of military persons necessary to subject the vessel to confiscation, it is difficult to define; since fewer persons of high quality and character may be of much more importance than a much greater number of persons of lower condition. To carry a veteran general, under some circumstances, might be a much more noxious act than the conveyance of a whole regiment. The consequences of such assistance are greater, and therefore the belligerent has a stronger right to prevent and punish it; nor is it material, in the judgment of the Prize Court, whether the

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In an English review of the Orders in Council on trade, during war, it is said: — "It was never intended that the prohibition (in the Order of the 18th of February, and the subsequent orders modifying it) should be construed into a fresh declaration of contraband of war. It rests with the courts of maritime jurisdiction to determine that question; and we presume that as steam machinery has become an important element of navigation and maritime warfare since the last war, the parts or materials of this machinery, when transported to an enemy's port, or for the use of the enemy, will be as liable to condemnation as sailcloth, cordage, or spars, have been in former wars, when not restricted by treaty with neutrals." . . . . "A question has been much discussed, whether *coals*, which are destined to play so essential a part in modern warfare, are to be held to be contraband; but it is of so much importance to our own cruisers to be able to take in coals at neutral ports, which they would not be able to do if coal was universally regarded as a prohibited article, that we should probably lose more than we can gain by contending for the prohibition. Coals, however, have been stopped on their way to an enemy's port on the Black Sea; though it appears, from an answer given in the House of Commons by Sir James Graham, that coals will be regarded by our cruisers as one of the articles *ancipitis usus*, not necessarily contraband, but liable to detention under circumstances that warrant suspicion of their being applied to the military or naval uses of the enemy." Edinburgh Review, No. 203, Art. 6, July, 1854, p. 103, Am. ed.]

[1] Robinson's Adm. Rep. vol. iv. p. 256. The Carolina.

master be ignorant of the character of the service on which he is engaged. It is deemed sufficient if there has been an injury arising to the belligerent from the employment in which the vessel is found. If imposition be practised, it operates as force; and if redress is to be sought against any person, it must be against those who have, by means either of compulsion or deceit, exposed the property to danger; otherwise such opportunities of conveyance would be constantly used, and it would be almost impossible, in the greater number of cases, to prove the privity of the immediate offender.[1]

The fraudulently carrying the despatches of the enemy will also subject the neutral vessel, in which they are transported, to capture and confiscation. The consequences of such a service are indefinite, infinitely beyond the effect of any contraband that can be conveyed. "The carrying of two or three cargoes of military stores," says Sir W. Scott, "is necessarily an assistance of a limited nature; but in the transmission of despatches may be conveyed the entire plan of a campaign, that may defeat all the plans of the other belligerent in that quarter of the world. It is true, as it has been said, that *one ball* might take off a Charles the XIIth, and might produce the most disastrous effects in a campaign; but that is a consequence so remote and accidental, that, in the contemplation of human events, it is a sort of evanescent quantity of which no account is taken; and the practice has been, accordingly, that it is in considerable quantities only that the offence of contraband is contemplated. The case of despatches is very different; it is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences. It is a service, therefore, which, in whatever degree it exists, can only be considered in one character — as an act of the most hostile nature. The offence of fraudulently carrying despatches in the service of the enemy being, then, greater than that of carrying contraband under any circumstances, it becomes absolutely necessary, as well as just, to resort to some other penalty than that inflicted in cases of contraband. The confiscation of the noxious article, which constitutes the penalty in contraband, where the vessel and

[1] Robinson's Adm. Rep. vol. vi. p. 430. The Orozembo.

cargo do not belong to the same person, would be ridiculous when applied to *despatches*. There would be *no* freight dependent on their transportation, and therefore this penalty could not, in the nature of things, be applied. The vehicle in which they are carried must, therefore, be confiscated." [1]

But carrying the despatches of an ambassador or other public minister of the enemy, resident in a neutral country, is an exception to the reasoning on which the above general rule is founded. "They are despatches from persons who are, in a peculiar manner, the favorite object of the protection of the law of nations, residing in the neutral country for the purpose of preserving the relations of amity between that State and their own government. On this ground, a very material distinction arises, with respect to the right of furnishing the conveyance. The neutral country has a right to preserve its relations with the enemy, and you are not at liberty to conclude that any communication between them can partake, in any degree, of the nature of hostility against you. The limits assigned to the operations of war against ambassadors, by writers on public law, are, that the belligerent may exercise his right of war against them, wherever the character of hostility exists: he may stop the ambassador of his enemy on his passage; but when he has arrived in the neutral country, and taken on himself the functions of his office, and has been admitted in his representative character, he becomes a sort of *middle man*, entitled to peculiar privileges, as set apart for the preservation of the relations of amity and peace, in maintaining which all nations are, in some degree, interested. If it be argued, that he retains his national character unmixed, and that even his residence is considered as a residence in his own country; it is answered, that this is a fiction of law, invented for his further protection only, and as such a fiction, it is not to be extended beyond the reasoning on which it depends. It was intended as a privilege; and cannot be urged to his disadvantage. Could it be said that he would, on that principle, be subject to any of the rights of war in the neutral territory? Certainly not: he is there for the purpose of carrying on the relations of peace and amity, for the interests of his own country primarily, but, at

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[1] Robinson's Adm. Rep. vol. vi. p. 440. The Atalanta.

the same time, for the furtherance and protection of the interests which the neutral country also has in the continuance of those relations. It is to be considered also, with regard to this question, what may be due to the convenience of the neutral State; for its interests may require that the intercourse of correspondence with the enemy's country should not be altogether interdicted. It might be thought to amount almost to a declaration, that an ambassador from the enemy shall not reside in the neutral State, if he is declared to be debarred from the only means of communicating with his own. For to what useful purpose can he reside there, without the opportunity of such a communication? It is too much to say that all the business of the two States shall be transacted by the minister of the neutral State resident in the enemy's country. The practice of nations has allowed to neutral States the privilege of receiving ministers from the belligerent powers, and of an immediate negotiation with them." [1] (*a*)

§ 26. Penalty for the carrying of contraband.

In general, where the ship and cargo do not belong to the same person, the contraband articles only are confiscated, and the carrier-master is refused his freight, to which he is entitled upon innocent articles which are con-

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[1] Sir W. Scott, Robinson's Adm. Rep. vol. vi. p. 461. The Caroline.

(*a*) [The preventing of neutrals bearing enemy despatches is included with the seizing of articles of contraband, as an exception to the otherwise unrestricted freedom of commerce, conceded to them by the "declarations" of England and France, and by the Order in Council, of the 15th of April, 1854. It is conceived that the carrying of despatches can only invest a neutral vessel with a hostile character in the case of its being employed for that purpose by the belligerent, and that it cannot affect with criminality either a regular postal packet or a merchant ship, which takes a despatch in its ordinary course of conveying letters, and with the contents of which the master must necessarily be ignorant. This view, it is supposed, is not inconsistent with the text, which refers to a fraudulent carrying of "the despatches of the enemy." Since the former European wars, some governments have established regular postal packets, whose mails, by international conventions, are distributed throughout the civilized world; while in other countries every merchant vessel is obliged to receive, till the moment of its setting sail, not only the despatches of the government, but all letters sent to it from the post-offices. Hautefeuille, Droits des Nations Neutres, tom. ii. p. 463. See also Postal Treaty of December 15, 1848, between the United States and Great Britain. U. S. Stat. at Large, vol. 9, p. 965.]

demned as enemy's property. But where the ship and the innocent articles of the cargo belong to the owner of the contraband, they are all involved in the same penalty. And even where the ship and the cargo do not belong to the same person, the carriage of contraband, under the fraudulent circumstances of false papers and false destination, will work a confiscation of the ship as well as the cargo. The same effect has likewise been held to be produced by the carriage of contraband articles in a ship, the owner of which is bound by the express obligation of the treaties subsisting between his own country and the capturing country, to refrain from carrying such articles to the enemy. In such a case, it is said that the ship throws off her neutral character, and is liable to be treated at once as an enemy's vessel, and as a violator of the solemn compacts of the country to which she belongs.[1]

The general rule as to contraband articles, as laid down by Sir W. Scott, is, that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. "Under the present understanding of the law of nations, you cannot generally take the proceeds in the return voyage. From the moment of quitting port on a hostile destination, indeed, the offence is complete, and it is not necessary to wait till the goods are actually endeavoring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto*, and in the actual prosecution of such a voyage, the penalty is not now generally held to attach."[2] But the same learned judge applied a different rule in other cases of contraband, carried from Europe to the East Indies, with false papers and false destination, intended to conceal the real object of the expedition, where the return cargo, the proceeds of the outward cargo taken on the return voyage, was held liable to condemnation.[3]

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[1] Robinson's Adm. Rep. vol. i. p. 91. The Ringende Jacob. Ibid. 244. The Sarah Christina. Ibid. 288. The Mercurius. Ibid. vol. iii. p. 217. The Franklin. Ibid. vol. iv. p. 69. The Edward. Ibid. vol. vi. p. 125. The Ranger. Ibid. vol. iii. p. 295. The Neutralitet.

As to how far the ship-owner is liable for the act of the master in cases of contraband, see Wheaton's Rep. vol. ii. Appendix, Note I. pp. 37, 38.

[2] Robinson's Adm. Rep. vol. iii. p. 168. The Ionia.

[3] Ibid. vol. ii. p. 343. The Rosalie and Betty. Ibid. vol. iii. p. 122. The Nancy.

Although the general policy of the American government, in its diplomatic negotiations, has aimed to limit the catalogue of contraband by confining it strictly to munitions of war, excluding all articles of promiscuous use, a remarkable case occurred during the late war between Great Britain and the United States, in which the Supreme Court of the latter appears to have been disposed to adopt all the principles of Sir W. Scott, as to provisions becoming contraband under certain circumstances. But as that was not the case of a cargo of *neutral* property, supposed to be liable to capture and confiscation as contraband of war, but of a cargo of *enemy's* property going for the supply of the enemy's naval and military forces, and clearly liable to condemnation, the question was, whether the neutral master was entitled to his freight, as in other cases of the transportation of innocent articles of enemy's property; and it was not essential to the determination of the case to consider under what circumstances articles *ancipitis usûs* might become contraband. Upon the actual question before the court, it seems there would have been no difference of opinion among the American judges in the case of an ordinary war; all of them concurring in the principle, that a neutral, carrying supplies for the enemy's naval or military forces, does, under the mildest interpretation of international law, expose himself to the loss of freight. But the case was that of a Swedish vessel, captured by an American cruiser, in the act of carrying a cargo of British property, consisting of barley and oats, for the supply of the allied armies in the Spanish peninsula, the United States being at war with Great Britain, but at peace with Sweden and the other powers allied against France. Under these circumstances a majority of the judges were of the opinion that the voyage was illegal, and that the neutral carrier was not entitled to his freight on the cargo condemned as enemy's property.

It was stated in the judgment of the court, that it had been

The soundness of these last decisions may be well questioned; for in order to sustain the penalty, there must be, on principle, a *delictum* at the moment of seizure. To subject the property to confiscation whilst the offence no longer continues, would be to extend it indefinitely, not only to the return voyage, but to all future cargoes of the vessel, which would thus never be purified from the contagion communicated by the contraband articles.

solemnly adjudged in the British prize courts, that being engaged in the transport service of the enemy, or in the conveyance of military persons in his employment, or the carrying of despatches, are acts of hostility which subject the property to confiscation. In these cases, the fact that the voyage was to a neutral port was not thought to change the character of the transaction. The principle of these determinations was asserted to be, that the party must be deemed to place himself in the service of the enemy State, and to assist in warding off the pressure of the war, or in favoring its offensive projects. Now these cases could not be distinguished, in principle, from that before the court. Here was a cargo of provisions exported from the enemy's country, with the avowed purpose of supplying the army of the enemy. Without this destination, they would not have been permitted to be exported at all. It was vain to contend that the direct effect of the voyage was not to aid the British hostilities against the United States. It might enable the enemy indirectly to operate with more vigor and promptitude against them, and increase his disposable force. But it was not the effect of the particular transaction which the law regards: it was the general tendency of such transactions to assist the military operations of the enemy, and to tempt deviations from strict neutrality. The destination to a neutral port could not vary the application of this rule. It was only doing that indirectly, which was directly prohibited. Would it be contended that a neutral might lawfully transport provisions for the British fleet and army, while it lay at Bordeaux preparing for an expedition to the United States? Would it be contended that he might lawfully supply a British fleet stationed on the American coast? An attempt had been made to distinguish this case from the ordinary cases of employment in the transport service of the enemy, upon the ground that the war of Great Britain against France was a war distinct from that against the United States; and that Swedish subjects had a perfect right to assist the British arms in respect to the former, though not to the latter. But the court held, that whatever might be the right of the Swedish sovereign, acting under his own authority, if a Swedish vessel be engaged in the actual service of Great Britain, or in carrying stores for the exclusive use of the British armies, she must, to all intents and purposes, be deemed a British transport. It was perfectly immaterial in

what particular enterprise those armies might, at the time, be engaged; for the same important benefits were conferred upon the enemy of the United States, who thereby acquired a greater disposable force to bring into action against them. In The Friendship, (6 Rob. 420,) Sir W. Scott, speaking on this subject, declared that "it signifies nothing, whether the men so conveyed are to be put into action on an immediate expedition or not. The mere shifting of drafts in detachments, and *the conveyance of stores* from one place to another, is an ordinary employment of a transport vessel, and it is a distinction totally unimportant whether this or that case may be connected with the *immediate active* service of the enemy. In removing forces from distant settlements, there may be no intention of immediate action; but still the general importance of having troops conveyed to places where it is convenient that they should be collected, either for present or future use, is what constitutes the object and employment of transport vessels." It was obvious that the learned judge did not deem it material to what places the stores might be destined; and it must be equally immaterial, what is the immediate occupation of the enemy's force. That force was always hostile to America, be it where it might. To-day it might act against France, to-morrow against the former country; and the better its commissary department was supplied, the more life and activity was communicated to all its motions. It was not therefore material whether there was another distinct war, in which the enemy of the United States was engaged, or not. It was sufficient, that his armies were everywhere their enemies; and every assistance offered to them must, directly or indirectly, operate to their injury.

The court was, therefore, of opinion that the voyage in which the vessel was engaged was illicit, and inconsistent with the duties of neutrality, and that it was a very lenient administration of justice to confine the penalty to a mere denial of freight.[1] (*a*)

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[1] Wheaton's Rep. vol. i. p. 382. The Commercen.

(*a*) ["Is is not the practice of nations to undertake to prohibit their own subjects, by previous laws, from trafficing in articles contraband of war. Such trade is carried on at the risk of those engaged in it, under the liabilities and penalties prescribed by the law of nations or particular treaties. If it be true, therefore,

§ 27. Rule of the war of 1756.

It had been contended in argument in the above case, that the exportation of grain from Ireland being gene-

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that citizens of the United States have been engaged in a commerce by which Texas, an enemy of Mexico, has been supplied with arms and munitions of war, the government of the United States, nevertheless, was not bound to prevent it, could not have prevented it without a manifest departure from the principles of neutrality, and is in no way answerable for the consequences. . . . . The 18th article (of the treaty between the United States and Mexico) enumerates those commodities which shall be regarded as contraband of war; but neither that article nor any other imposes on either nation any duty of preventing, by previous regulation, commerce in such articles. Such commerce is left to its ordinary fate, according to the law of nations." Mr. Webster to Mr. Thompson, July 8, 1842. Webster's Works, vol. vi. p. 452.

"As the law has been declared by the decisions of courts of admiralty and elementary writers, it allows belligerents to search neutral vessels for articles contraband of war and for enemy's goods. If the doctrine is so modified as to except from seizure and confiscation enemy's property under a neutral flag, still the right to seize articles contraband of war, on board of neutral vessels, implies the right to ascertain the character of the cargo. . . . A persistent resistance by a neutral vessel to submit to a search renders it confiscable, according to the settled determinations of the English admiralty." Mr. Marcy to Mr. Buchanan, April 13, 1854. Cong. Doc. 33 Cong. 1 Sess. H. R., Doc. 103, p. 21.

Such is the law of nations, as hitherto understood, but as, by the adoption of the principle that neutral vessels give immunity even to enemy's goods, there is no longer a pretence for the existence of the right of search, unless, as connected with contraband, it may well become the interest of neutrals, if this exception is to remain the rule, not only that the extent to which it is to be applied should be defined, but that their own governments should themselves undertake to enforce the prohibition, and thus remove from belligerents the only apology for violating that nationality which should attach to the ship, in common with the territory of the country to which it belongs. This has been done in the present war by Austria, whose decree of 25th May, 1854, prohibits Austrian vessels from transporting troops belonging to the belligerent powers and from carrying articles contraband of war. Paris Moniteur, June 9, 1854. By a Swedish ordinance, bearing date the 8th of April, 1854, Swedish sea captains are forbidden, unless under actual force, and in that case after formal protest — to carry despatches, troops, or articles contraband of war, for any belligerent power. See Cong. Doc. 33 Cong. 1 Sess. H. R. No. 103, p. 21. It is indeed already established by many treaties that, in the case of vessels under convoy, the declaration of the commander that there is no contraband on board vessels destined for an enemy's port shall suffice. Vide infra, note to § 29.

It is to be remembered as a further inducement for getting rid of the right of search on account of contraband, now that it is no longer applicable for enemy's goods, that it has never been claimed that British men of war could enter a merchant ship for the purpose of searching for seamen, but the Prince Regent, in

rally prohibited, a neutral could not lawfully engage in that trade during war, upon the principle of what has been called the "Rule of the War of 1756," in its application to the colonial and coasting trade of an enemy not generally open in time of peace. The court deemed it unnecessary to consider the principles on which that rule is rested by the British prize courts, not regarding them as applicable to the case in judgment. But the legality of the rule itself has always been contested by the American government, and it appears in its origin to have been founded upon very different principles from those which have more recently been urged in its defence. During the war of 1756, the French government, finding the trade with their colonies almost entirely cut off by the maritime superiority of Great Britain, relaxed their monopoly of that trade, and allowed the Dutch, then neutral, to carry on the commerce between the mother country and her colonies, under special licenses or passes, granted for this particular purpose, excluding, at the same time, all other neutrals from the same trade. Many Dutch vessels so employed were captured by the British cruisers, and, together with their cargoes, were condemned by the prize courts, upon the principle, that by such employment they were, in effect, incorporated into the French navigation, having adopted the commerce and character of the enemy, and identified themselves with his interests

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his declaration, in reference to the causes of the war of 1812, puts the exercise of the right of impressment, as incidental to that of search for enemy's goods and contraband. He says, that he can never admit that, "in the exercise of the undoubted and hitherto undisputed right of searching neutral merchant vessels in time of war," the impressment of British seamen, when found therein, can be deemed any violation of a neutral flag; nor that taking such seamen from on board such vessels, can be considered a hostile measure or a justifiable cause of war. Annual Register, 1813, p. 2.

The Russian declaration differs from the English and French, inasmuch as by it the vessel carrying contraband, as well as the article itself is confiscated; whereas the cruisers of the latter seize the contraband only. "Il s' entend de soi-même que le pavillon neutre ne pourra couvrir les cargaisons et objets qui d'après le droit des gens sont reconnus contrebande de guerre. En conséquence les navires à bord desquels il sera trouvé de la contrebande de cette nature seront saisis par nos croiseurs et reconnus de bonne prise, conformément à l'avis déjà publié par le ministère des finances le 27 Novembre, de l'année dernière." Avis du 19 Avril, 1854, Annuaire, &c., 1853–4, App. p. 928.]

and purposes. They were, in the judgment of these courts, to be considered like transports in the enemy's service, and hence liable to capture and condemnation, upon the same principle with property condemned for carrying military persons or despatches. In these cases, the property was considered, *pro hâc vice*, as enemy's property, as so completely identified with his interests as to acquire a hostile character. So, where a neutral is engaged in a trade, which is exclusively confined to the subjects of any country, in peace and in war, and is interdicted to all others, and cannot at any time be avowedly carried on in the name of a foreigner, such a trade is considered so entirely national, that it must follow the hostile situation of the country.[1] There is all the difference between this principle and the more modern doctrine which interdicts to neutrals, during war, all trade not open to them in time of peace, that there is between the granting by the enemy of special licenses to the subjects of the opposite belligerent, protecting their property from capture in a particular trade which the policy of the enemy induces him to tolerate, and a general exemption of such trade from capture. The former is clearly cause of confiscation, whilst the latter has never been deemed to have such an effect. The Rule of the War of 1756 was originally founded upon the former principle: it was suffered to lay dormant during the war of the American Revolution; and when revived at the commencement of the war against France in 1793, was applied, with various relaxations and modifications, to the prohibition of all neutral traffic with the colonies and upon the coasts of the enemy. The principle of the rule was frequently vindicated by Sir W. Scott, in his masterly judgments in the High Court of Admiralty and in the writings of other British public jurists of great learning and ability. But the conclusiveness of their reasonings was ably contested by different American statesmen, and failed to procure the acquiescence of neutral powers in this prohibition of their trade with the enemy's colonies. The question continued a fruitful source of contention between Great Britain and those powers,

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[1] Robinson's Adm. Rep. vol. ii. p. 52. The Princessa. Ibid. vol. iv. p. 118. The Anna Catharina. Ibid. 121. The Rendsborg. Ibid. vol. v. p. 150. The Vrow Anna Catharina. Wheaton's Rep. vol. ii. Appendix, p. 29.

until they became her allies or enemies at the close of the war; but its practical importance will probably be hereafter much diminished by the revolution which has since taken place in the colonial system of Europe.[1] (*a*)

§ 28. Breach of blockade.

Another exception to the general freedom of neutral commerce in time of war, is to be found in the trade to ports or places besieged or blockaded by one of the belligerent powers.

The more ancient text writers all require that the siege or blockade should actually exist, and be carried on by an adequate force, and not merely declared by proclamation, in order to render commercial intercourse with the port or place unlawful on the part of neutrals. Thus Grotius forbids the carrying any thing to besieged or blockaded places, "*if* it might impede the execution of the belligerent's lawful designs, and if the carriers might have known of the siege or blockade; as in the case of a town actually invested, or a port closely blockaded, and when a surrender or peace is already expected to take place."[2] And Bynkershoek, in commenting upon this passage, holds it to be "unlawful to carry any thing, whether contraband or not, to a

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[1] Wheaton's Rep. vol. i. Appendix, Note III. See Madison's "Examination of the British doctrine which subjects to capture a neutral trade not open in time of peace."

(*a*) [The rule of 1756 is, of course, wholly superseded during the present war by the provision in the Order in Council of the 15th of April, allowing neutrals to trade to all ports and places wheresoever situated, that are not in a state of blockade. But, it is on other accounts, also, obsolete. The free trade which England has proffered to the navigation of all the world, including a participation in her colonial and coasting trade, on an equality with her own vessels, does not admit of rules, which governed in a period of monopoly, and when any relaxation, which a belligerent accorded to neutrals, might be deemed not a permanent regulation of trade, but strictly a measure to evade those advantages which a superior military marine placed within the control of its enemy. The Edinburgh Review says: "In the case of Russia, as she has no colonies, the rule of 1756 is inapplicable; and, indeed, since the colonial trade of England and Spain has become free, the theory on which that restriction was based falls to the ground." Edinburgh Review, No. 203, art. 6.]

[2] "*Si juris mei executionem rerum subvectio impediret, idque scire potuerit qui advexit, ut si* OPPIDUM OBSESSUM TENEBAM, *si* PORTUS CLAUSOS, *et jam deditio aut pax expectabatur*," &c. Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 1, § 5, note 3.

place thus circumstanced; since those who are within may be compelled to surrender, not merely by the direct application of force, but also by the want of provisions and other necessaries. If, therefore, it should be lawful to carry to them what they are in need of, the belligerent might thereby be compelled to raise the siege or blockade, which would be doing him an injury, and therefore unjust. And because it cannot be known what articles the besieged may want, the law forbids, in general terms, carrying *any thing* to them; otherwise disputes and altercations would arise to which there would be no end." [1]

Bynkershoek appears to have mistaken the true sense of the above-cited passage from Grotius, in supposing that the latter meant to require, as a necessary ingredient in a strict blockade, that there should be an expectation of peace or of a surrender, when, in fact, he merely mentions that as an example, by way of putting the strongest possible case. But that he concurred with Grotius in requiring a strict and actual siege or blockade, such as where a town is actually invested with troops, or a port closely blockaded by ships of war, (*oppidum obsessum, portus clausos,*) is evident from his subsequent remarks in the same chapter, upon the decrees of the States-General against those who should carry any thing to the Spanish camp, the same not being then actually besieged. He holds the decrees to be perfectly justifiable, so far as they prohibited the carrying of contraband of war to the enemy's camp; "but, as to other things, whether they were or were not lawfully prohibited, depends entirely upon the circumstance of the place being besieged or

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[1] "Sola obsidio in causâ est, cur nihil obsessis subvehere liceat, sive *contrabandum* sit, sive non sit, nam obsessi non tantam vi coguntur ad deditionem, sed et fame, et aliâ aliarum rerum penuriâ. Si quid eorum, quibus indigeat, tibi adferre liceret, ego fortè cogerer obsidionem solvere, et sic facto tuo mihi noceres, quod iniquum est. Quia autem scire nequit, quibus rebus obsessi indigeant, quibus abundent, omnis subvectio vetita est, alioquin altercationum nullus omnino esset modus vel finis. Hactenus Grotii sententiæ accedo, sed vellem ne ibidem addidisset, tunc demum id verum esse, *si jam deditio aut pax expectabatur*, ... nam nec rationi conveniunt, nec pactis Gentium, quæ mihi succurrerunt. Quæ ratio me arbitrum constituit de futurâ deditione aut pace? et, si neutra exspectetur, jam licebit obsessis quælibet advehere? imo nunquam licet, durante obsidione, et amici non est causam amici perdere, vel quoque modo deteriorem facere." Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 11.

not." So, also, in commenting upon the decree of the States-General of the 26th June, 1630, declaring the ports of Flanders in a state of blockade, he states that this decree was, for some time, not carried into execution, by the actual presence of a sufficient naval force, during which period certain neutral vessels trading to those ports were captured by the Dutch cruisers; and that part of their cargoes only which consisted of contraband articles was condemned, whilst the residue was released with the vessels. "It has been asked," says he, "by what law the contraband goods were condemned under those circumstances, and there are those who deny the legality of their condemnation. It is evident, however, that whilst those coasts were guarded in a lax or remiss manner, the law of blockade, by which all neutral goods going to or coming from a blockaded port may be lawfully captured, might also have been relaxed; but not so the general law of war, by which contraband goods, when carried to an enemy's port, even though not blockaded, are liable to confiscation."[1]

What things must be proved to constitute a violation of blockade.

"To constitute a violation of blockade," says Sir W. Scott, "three things must be proved: 1st. The existence of an actual blockade; 2dly. The knowledge of the party supposed to have offended; and, 3dly. Some act of violation, either by going in or coming out with a cargo laden after the commencement of blockade."[2]

Actual presence of the blockading force.

1. The definition of a lawful maritime blockade, requiring the actual presence of a maritime force, stationed at the entrance of the port, sufficiently near to prevent communication, as given by the text writers, is confirmed by the authority of numerous modern treaties, and especially by the Convention of 1801, between Great Britain and Russia, intended as a final adjustment of the disputed points of maritime law, which had given rise to the armed neutrality of 1780 and of 1801.[3]

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[1] Wheaton's Hist. Law of Nations, pp. 138–143.

[2] Robinson's Adm. Rep. vol. i. p. 92. The Betsey.

[3] The 3d art. sect. 4, of this convention, declares: — "That in order to determine what characterizes a blockaded port, that denomination is given only where there is, by the disposition of the power which attacks it with ships stationary, or sufficiently near, an evident danger in entering."

The only exception to the general rule, which requires the actual presence of an adequate force to constitute a lawful blockade, arises out of the circumstance of the occasional temporary absence of the blockading squadron, produced by accident, as in the case of a storm, which does not suspend the legal operation of the blockade. The law considers an attempt to take advantage of such an accidental removal a fraudulent attempt to break the blockade.[1]

Knowledge of the party.

2. As a proclamation, or general public notification, is not of itself sufficient to constitute a legal blockade, so neither can a knowledge of the existence of such a blockade be imputed to the party, *merely* in consequence of a such a proclamation or notification. Not only must an actual blockade exist, but a knowledge of it must be brought home to the party, in order to show that it has been violated.[2] As, on the one hand, a declaration of blockade which is not supported by the fact cannot be deemed legally to exist, so, on the other hand, the fact, duly notified to the party on the spot, is of itself sufficient to affect him with a knowledge of it; for the public notifications between governments can be meant only for the information of individuals; but if the individual is personally informed, that purpose is still better obtained than by a public declaration.[3] Where the vessel sails from a country lying sufficiently near to the blockaded port to have constant information of the state of the blockade, whether it is continued or is relaxed, no special notice is necessary; for the public declaration in this case implies notice to the party, after sufficient time has elapsed to receive the declaration at the port whence the vessel sails.[4] But where the country lies at such a distance that the inhabitants cannot have this constant information, they may lawfully send their vessels conjecturally, upon the expectation of finding the blockade broken up, after it has existed for a considerable time. In this case, the party has a right to make a fair inquiry whether the blockade be determined or not, and consequently cannot be involved in the penalties affixed to a violation of it, unless,

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[1] Robinson's Adm. Rep. vol. i. p. 154. The Columbia.
[2] Ibid. p. 93. The Betsey. [3] Ibid. p. 83. The Mercurius.
[4] Ibid. vol. ii. p. 131. The Jonge Petronella. Ibid. 298. The Calypso.

upon such inquiry, he receives notice of the existence of the blockade.[1]

"There are," says Sir W. Scott, "two sorts of blockade: one by the *simple fact* only, the other by a notification accompanied with the fact. In the former case, when the fact ceases otherwise than by accident, or the shifting of the wind, there is immediately an end of the blockade; but where the fact is accompanied by a public notification from the government of a belligerent country to neutral governments, I apprehend, *primâ facie*, the blockade must be supposed to exist till it has been publicly repealed. It is the duty, undoubtedly, of a belligerent country, which has made the notification of blockade, to notify in the same way, and immediately, the discontinuance of it; to suffer the fact to cease, and to apply the notification again at a distant time, would be a fraud on neutral nations, and a conduct which we are not to suppose that any country would pursue. I do not say that a blockade of this sort may not, in any case, expire *de facto;* but I say that such a conduct is not hastily to be presumed against any nation; and, therefore, till such a case is clearly made out, I shall hold that a blockade by notification is, *primâ facie*, to be presumed to continue till the notification is revoked."[2] And in another case he says:—"The effect of a notification to any foreign government would clearly be to include all the individuals of that nation; it would be nugatory, if individuals were allowed to plead their ignorance of it; it is the duty of foreign governments to communicate the information to their subjects, whose interests they are bound to protect. I shall hold, therefore, that a neutral master can never be heard to aver against a notification of blockade that he is ignorant of it. If he is really ignorant of it, it may be subject of representation to his own government, and may raise a claim of compensation from them, but it can be no plea in the court of a belligerent. In the case of a blockade *de facto* only, it may be otherwise; but this is a case of a blockade by notification. Another distinction between a notified blockade and a blockade existing *de facto* only, is, that in the former the act of sailing for a blockaded

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[1] Robinson's Adm. Rep. vol. i. p. 332. The Betsey.

[2] Ibid. vol. i. p. 171. The Neptunus.

place is sufficient to constitute the offence. It is to be presumed that the notification will be formally revoked, and that due notice will be given of it; till that is done, the port is to be considered as closed up; and from the moment of quitting port to sail on such a destination, the offence of violating the blockade is complete, and the property engaged in it subject to confiscation. It may be different in a blockade existing *de facto* only; there no presumption arises as to the continuance, and the ignorance of the party may be admitted as an excuse for sailing on a doubtful and provisional destination.[1]

A more definite rule, as to the notification of an existing blockade, has been frequently provided by conventional stipulations between different maritime powers. Thus, by the 18th article of the Treaty of 1794, between Great Britain and the United States, it was declared: — "That whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested, it is agreed that every vessel so circumstanced may be turned away from such port or place; but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper." This stipulation, which is equivalent to that contained in previous treaties between Great Britain and the Baltic powers, having been disregarded by the naval authorities and prize courts in the West Indies, the attention of the British government was called to the subject by an official communication from the American government. In consequence of this communication, instructions were sent out, in the year 1804, by the Board of Admiralty, to the naval commanders and judges of the Vice-Admiralty Courts, not to consider any blockade of the French West India islands as existing, unless in respect to particular ports which were actually invested; and then not to capture vessels bound to such ports, unless they should previously have been warned not to enter them. The stipulation in the treaty intended to be enforced by these instructions seems to be a correct exposition of the law of nations, and is admitted by the

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[1] Robinson's Adm. Rep. vol. ii. p. 112. The Neptunus, Hempel.

contracting parties to be a correct exposition of that law, or to constitute a rule between themselves in place of it. Neither the law of nations nor the treaty admits of the condemnation of a neutral vessel for the mere intention to enter a blockaded port, unconnected with any fact. In the above-cited cases, the fact of sailing was coupled with the intention, and the condemnation was thus founded upon a supposed actual breach of the blockade. Sailing for a blockaded port, knowing it to be blockaded, was there construed into an attempt to enter that port, and was, therefore, adjudged a breach of blockade from the departure of the vessel. But the fact of clearing out for a blockaded port is, in itself, innocent, unless it be accompanied with a knowledge of the blockade. The right to treat the vessel as an enemy, is declared by Vattel, (liv. iii. sect. 177,) to be founded on the *attempt* to enter; and certainly this attempt must be made by a person knowing the fact. The import of the treaty, and of the instructions issued in pursuance of the treaty, is, that a vessel cannot be placed in the situation of one having a notice of the blockade, until she is warned off. They gave her a right to inquire of the blockading squadron, if she had not previously received this warning from one capable of giving it, and consequently dispensed with her making that inquiry elsewhere. A neutral vessel might thus lawfully sail for a blockaded port, knowing it to be blockaded; and being found sailing towards such a port would not constitute an attempt to break the blockade, unless she should be actually warned off.[1]

Where an enemy's port was declared in a state of blockade by notification, and at the same time when the notification was issued news arrived that the blockading squadron had been driven off by a superior force of the enemy, the blockade was held by the Prize Court to be null and defective from the beginning, in the main circumstance that is essentially necessary to give it legal operation; and that it would be unjust to hold neutral vessels to the observance of a notification, accompanied by a circumstance that defeated its effect. This case was, therefore, considered as independent of the presumption arising from noti-

[1] Cranch's Rep. vol. iv. p. 185. Fitzsimmons *v.* The Newport Insurance Company. Mr. Merry's Letter to Mr. Secretary Madison, 12th April, 1804. Wheaton's Rep. vol. iii. Appendix, p. 11.

fication in other instances; the notification being defeated, it must have been shown that the actual blockade was again resumed, and the vessel would have been entitled to a warning, if any such blockade had existed when she arrived off the port. The mere act of sailing for the port, under the dubious state of the actual blockade at the time, was deemed insufficient to fix upon the vessel the penalty for breaking the blockade.[1]

In the above case, a question was raised whether the notification which had issued was not still operative; but the court was of opinion that it could not be so considered, and that a neutral power was not obliged, under such circumstances, to presume the continuance of a blockade, nor to act upon a supposition that the blockade would be resumed by any other competent force. But in a subsequent case, where it was suggested that the blockading squadron had actually returned to its former station off the port, in order to renew the blockade, a question arose whether there had been that notoriety of the fact, arising from the operation of time, or other circumstances, which must be taken to have brought the existence of the blockade to the knowledge of the parties. Among other modes of resolving this question, a prevailing consideration would have been the length of time, in proportion to the distance of the country from which the vessel sailed. But as nothing more came out in evidence than that the squadron came off the port on a certain day, it was held that this would not restore a blockade which had been thus effectually raised, but that it must be renewed again by notification, before foreign nations could be affected with an obligation to observe it. The squadron might return off the port with different intentions. It might arrive there as a fleet of observation merely, or for the purpose of only a qualified blockade. On the other hand, the commander might attempt to connect the two blockades together; but this is what could not be done; and, in order to revive the former blockade, the same form of communication must have been observed *de novo* that is necessary to establish an original blockade.[2]

Some act of violation.

3. Besides the knowledge of the party, some act of violation is essential to a breach of blockade; as either

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[1] Robinson's Adm. Rep. vol. vi. p. 65. The Triheten.

[2] Ibid. p. 112. The Hoffnung.

going in or coming out of the port with a cargo laden after the commencement of the blockade.[1]

Thus, by the edict of the States-General of Holland, of 1630, relative to the blockade of the ports of Flanders, it was ordered that the vessels and goods of neutrals which should be found going in or coming out of the said ports, or so near thereto as to show beyond a doubt that they were endeavoring to run into them; or which, from the documents on board, should appear bound to the said ports, although they should be found at a distance from them, should be confiscated, unless they should, voluntarily, before coming in sight of or being chased by the Dutch ships of war, change their intention, while the thing was yet undone, and alter their course. Bynkershoek, in commenting upon this part of the decree, defends the reasonableness of the provision which affects vessels *found so near to the blockaded ports as to show beyond a doubt that they were endeavoring to run into them*, upon the ground of legal presumption, with the exception of extreme and well-proved necessity only. Still more reasonable is the infliction of the penalty of confiscation, where the intention is expressly avowed by the papers found on board. The third article of the same edict also subjected to confiscation such vessels and their cargoes as should come out of the said ports, not having been forced into them by stress of weather, although they should be captured at a distance from them, unless they had, after leaving the enemy's port, performed their voyage to a port of their own country, or to some other neutral or free port, in which case they should be exempt from condemnation; but if, in coming out of the said ports of Flanders, they should be pursued by the Dutch ships of war, and chased into another port, such as their own, or that of their destination, and found on the high seas coming out of *such port*, in that case they might be captured and condemned. Bynkershoek considers this provision as distinguishing the case of a vessel having broken the blockade, and afterwards terminated her voyage by proceeding voluntarily to her destined port, and that of a vessel chased and compelled to take refuge; which latter might still be captured after leaving the port in which she had taken refuge. And

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[1] Robinson's Adm. Rep. vol. i. 93. The Betsey.

in conformity with these principles is the more modern law and practice.[1]

With respect to violating a blockade by coming out with a cargo, the time of shipment is very material; for although it might be hard to refuse a neutral liberty to retire with a cargo already laden, and by that act already become neutral property; yet, after the commencement of a blockade, a neutral cannot be allowed to interpose, in any way, to assist the exportation of the property of the enemy.[2] A neutral ship departing can only take away a cargo *bonâ fide* purchased and delivered before the commencement of the blockade; if she afterwards take on board a cargo, it is a violation of the blockade. But where a ship was transferred from one neutral merchant to another in a blockaded port, and sailed out in ballast, she was determined not to have violated the blockade.[3] So where goods were sent into the blockaded port before the commencement of the blockade, but reshipped by order of the neutral proprietor, as found unsaleable, during the blockade, they were held entitled to restitution. For the same rule which permits neutrals to withdraw their vessels from a blockaded port extends also, with equal justice, to merchandise sent in before the blockade, and withdrawn *bonâ fide* by the neutral proprietor.[4]

After the commencement of a blockade, a neutral is no longer at liberty to make any purchase in that port. Thus, where a ship which had been purchased by a neutral of the enemy in a blockaded port, and sailed on a voyage to the neutral country, had been driven by stress of weather into a belligerent port, where she was seized, she was held liable to condemnation under the general rule. That the vessel had been purchased out of the proceeds of the cargo of another vessel, was considered as an unavailing circumstance on a question of blockade. If the ship has been purchased in a blockaded port, *that* alone is the illegal

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1 Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 11. Robinson's Adm. Rep. vol. ii. p. 128. The Welvaart Van Pillaw. Ibid. vol. iii. p. 147. The Juffrow Maria Schroeder.

2 Robinson's Adm. Rep. vol. i. p. 93. The Betsey.

3 Ibid. p. 150. The Vrow Judith.

4 Ibid. vol. iv. p. 89. The Potsdam. Wheaton's Rep. vol. iii. p. 183. Olivera *v.* Union Insurance Company.

act, and it is perfectly immaterial out of what funds the purchase was effected. Another distinction taken in argument was, that the vessel had terminated her voyage, and therefore that the penalty would no longer attach. But this was also overruled, because the port into which she had been driven was not represented as forming any part of her original destination. It was therefore impossible to consider this accident as any discontinuance of the voyage, or as a defeasance of the penalty which had been incurred.[1]

A maritime blockade is not violated by sending goods to the blockaded port, or by bringing them from the same, through the interior canal navigation or land carriage of the country. A blockade may be of different descriptions. A mere maritime blockade, effected by a force operating only at sea, can have no operation upon the interior communications of the port. The legal blockade can extend no further than the actual blockade can be applied. If the place be not invested on the land side, its interior communications with other ports cannot be cut off. If the blockade be rendered imperfect by this rule of construction, it must be ascribed to its physical inadequacy, by which the extent of its legal pretensions is unavoidably limited.[2] But goods shipped in a river, having been previously sent in lighters along the coast from the blockaded port, with the ship under charter-party proceeding also from the blockaded port in ballast to take them on board, were held liable to confiscation. This case is very different from the preceding, because there the communication had been by inland navigation, which was in no manner and in no part of it subject to the blockade.[3]

The offence incurred by a breach of blockade generally remains during the voyage; but the offence never travels on with the vessel further than to the end of the return voyage, although if she is taken in any part of that voyage, she is taken *in delicto*. This is deemed reasonable, because no other opportunity is afforded to the belligerent cruisers to vindicate the violated law. But where the blockade has been raised between the time of sailing

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1 Robinson's Adm. Rep. vol. iv. Note. The Juffrow Maria Schroeder.

2 Edwards's Adm. Rep. p. 32. The Comet.

3 Robinson's Adm. Rep. vol. iii. p. 297. The Neutralitet. Vol. iv. p. 65. The Stert.

and the capture, the penalty does not attach; because the blockade being gone, the necessity of applying the penalty to prevent future transgression no longer exists. When the blockade is raised, a veil is thrown over every thing that has been done, and the vessel is no longer taken *in delicto*. The *delictum* may have been completed at one period, but it is by subsequent events done away.[1] (*a*)

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1 Robinson's Adm. Rep. vol. ii. p. 128. The Welvaart Van Pillaw. Vol. vi. p. 387. The Lisette. As to how far the act of the master binds the ship-owner in cases of breach of blockade, see the cases collected in Wheaton's Reports, vol. ii. Appendix, pp. 36–40.

(*a*) [The prohibition on the trade of neutrals with blockaded ports, in the English and French "declarations" of March, 1854, already noticed, applies in terms to an "effective blockade, which may be established with an adequate force against the enemy's forts, harbors, or coasts." The further definition of what shall constitute an *effective blockade* is not given. The section from the maritime convention of 1801, cited note 3, p. 577, was understood to have adopted, as a concession to the northern powers, in return for their abandonment of more important points of maritime law, the rule of the armed neutralities of 1780 and 1800; which declared that no port should be considered blockaded, unless where the power attacking it should maintain a squadron constantly stationed before it, and sufficiently near to create an evident danger of entering. There is, however, a substitution of the disjunctive for the copulative conjunction in the Convention of 1801; so that instead of requiring, to effect a valid blockade, that the ships of the blockading squadron should be "stationary *and* sufficiently near," that convention only provides that they shall be "stationary *or* sufficiently near." By this minute change, it was contended in parliament, that it was intended to establish, in their full extent, the principles which Great Britain had maintained on this question of maritime law, and which the article, as it stood in the two declarations of armed neutrality, was calculated completely to subvert. Wheaton's Hist. of the Law of Nations, p. 418. The doctrine of Sir William Scott, announced in the text, that a blockade may continue during a temporary absence of the blockading squadron, and which gives to the diplomatic notification of the blockade once made, and even to the pretended notoriety of the fact, an effect independent of the actual presence of the blockading squadron, is controverted, on principle, by the French publicists, who contend that it must cease by an absence, however occasioned; and whatever may be the formalities under which it was instituted — that a nation can only execute its laws within its own jurisdiction — that it is upon the supposition that a part of the sea, within the jurisdictional limits of the enemy, and where their squadron is stationed, has been conquered, and that the blockading squadron has succeeded to the occupation of the former possessors, that its interference with the navigation of neutrals can on principle be maintained. Hautefeuille, Droits des Nations Neutres, t. iii. p. 120. Ortolan, Diplomatie de la Mer, chap. 9, tom. ii. p. 311, 2d edit.

The right of visitation and search of neutral vessels at sea is a belligerent right, essential to the exercise of

§ 29. Right of visitation and search.

As to the rule, not allowing a vessel to depart which has taken her cargo on board after the blockade was known, Mr. Marcy remarks: — "In some respects I think the law of blockade is unreasonably rigorous towards neutrals, and they can fairly claim a relaxation of it. By the decisions of the English Courts of Admiralty — and ours have generally followed in their footsteps — a neutral vessel which happens to be in a blockaded port is not permitted to depart with a cargo, unless that cargo was on board at the time when the blockade was commenced, or was first made known. Having visited the port in the common freedom of trade, a neutral vessel ought to be permitted to depart with a cargo, without regard to the time when it was received on board." Mr. Marcy to Mr. Buchanan, April 13, 1854. Cong. Doc. The rule here objected to is adopted in the treaties of the United States with Chili, of 1832, and with Peru-Bolivia, of 1836. U. S. Statutes at Large, vol. viii. p. 437, 492.

The instructions of the French government, in the case of the Mexican and Argentine blockades, direct their commanders to oppose, even by force, the entry of neutral ships of war into the blockaded ports. Ortolan, Diplomatie de la Mer, liv. iii. c. 9, tom. ii. p. 334, 2d edit.

Though a blockade is, in its nature, a belligerent act, the blockade of the Turco-Egyptian fleet, at Navarino, in 1827, was instituted during a period of professed peace. Such was also the case as to the blockade of the ports of the Argentine Republic, commencing in 1838, by England and France, and which was submitted to by other nations, though contraband articles destined for those ports were released, on the ground that, notwithstanding the blockade, France was not at war with that Republic. Hautefeuille, Droits des Nations Neutres, tom. ii. p. 423. The war of France with Mexico, which terminated by a treaty of peace in 1839, was preceded by two years of blockade. In the last case, a question, which it was agreed to refer to the arbitration of a third power, arose, on the conclusion of peace, whether the vessels sequestered during the blockade, and before the declaration of war by Mexico, should be restored. However the point, whether a blockade is to be deemed a pacific remedy, may be settled, as regards the parties immediately concerned, it cannot be sustained as to neutrals, otherwise than as a belligerent measure. From the right of conquest exercised over the territorial sea arises the right of blockade, which is the right of jurisdiction accorded by the primitive law to the territorial sovereign; a right by virtue of which he excludes all foreigners from passing through his dominions, and the immediate consequence of which is, to cut off the place surrounded by the conquered territory from all communication with the foreigners beyond it. The duty of these foreigners, of these neutrals, is to respect the law of the territorial sovereignty; they cannot enter his dominions against his consent, without being exposed to the application of the laws, which they violate. A blockade is, then, an act of war. It is the result of a previous act, which can only take place during war — the complete conquest and continued possession of a part of the enemy's territory. Ibid. tom. iii. pp. 10, 182.]

the right of capturing enemy's property, contraband of war, and vessels committing a breach of blockade. Even if the right of capturing enemy's property be ever so strictly limited, and the rule of *free ships free goods* be adopted, the right of visitation and search is essential, in order to determine whether the ships themselves are neutral, and documented as such, according to the law of nations and treaties; for, as Bynkershoek observes, "It is lawful to detain a neutral vessel, in order to ascertain, not by the flag merely, which may be fraudulently assumed, but by the documents themselves on board, whether she is really neutral." Indeed it seems that the practice of maritime captures could not exist without it. Accordingly the text writers generally concur in recognizing the existence of this right.[1]

The international law on this subject is ably summed up by Sir W. Scott, in the case of The Maria, where the exercise of the right was attempted to be resisted by the interposition of a convoy of Swedish ships of war. In delivering the judgment of the High Court of Admiralty in that memorable case, this learned civilian lays down the three following principles of law: —

1. That the right of visiting and searching merchant-ships on the high seas, whatever be the ships, the cargoes, the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. "I say, be the ships, the cargoes, and the destinations what they may, because, till they are visited and searched, it does not appear what the ships, or the destination are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle, that no man can deny it who admits the right of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured, it is impossible to capture. Even those who contend for the inadmissible rule that *free ships make free goods*, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right

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[1] Bynkershoek, Quæst. Jur. Pub. lib. i. cap. 14. Vattel, Droit des Gens, liv. iii. ch. 7, § 114. Martens, Précis, &c., liv. viii. ch. 7, §§ 317, 321. Galliani, dei Doveri de Principi Neutrali, &c., p. 458. Lampredi, Del Commercio de Popoli Neutrali, &c., p. 185. Klüber, Droit des Gens Moderne de l'Europe, § 293.

is equally clear in practice; for practice is uniform and universal upon the subject. The many European treaties which refer to this right, refer to it as preëxisting, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges."

2. That the authority of the neutral sovereign being forcibly interposed cannot legally vary the rights of a lawfully commissioned belligerent cruiser. "Two sovereigns may unquestionably agree, if they think fit, as in some late instances they have agreed, by special covenant, that the presence of one of their armed ships along with their merchant-ships shall be mutually understood to imply that nothing is to be found in that convoy of merchant-ships inconsistent with amity or neutrality; and if they consent to accept this pledge, no third party has a right to quarrel with it, any more than any other pledge which they may agree mutually to accept. But surely no sovereign can legally compel the acceptance of such a security by mere force. The only security known to the law of nations upon this subject, independently of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it."

3. That the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search. "For the proof of this I need only refer to Vattel, one of the most correct and certainly not the least indulgent of modern professors of public law. In book iii. c. 7, sect. 114, he expresses himself thus:—'On ne peut empêcher le transport des effets de contrebande, si l'on ne visite pas les vaisseaux neutres. On est donc en droit de les visiter. Quelques nations puissantes ont refusé en différents temps de se soumettre à cette visite. Aujourd'hui un vaisseau neutre, qui refuseroit de souffrir la visite, se feroit condamner par cela seul, comme étant de bonne prise.' Vattel is here to be considered not as a lawyer merely delivering an opinion, but as a witness asserting a fact—the fact that such is the existing practice of modern Europe. Conformably to this principle, we find in the celebrated French ordinance of 1681, now in force, article 12, 'That every vessel shall be good prize in case of resistance and combat;' and Valin, in his smaller Commentary, p. 81, says expressly, that, although the expression is in the conjunctive, yet that the *resistance alone is*

sufficient. He refers to the Spanish ordinance, 1718, evidently copied from it, in which it is expressed in the disjunctive, 'in case of resistance *or* combat.' And recent instances are at hand and within view, in which it appears that Spain continues to act upon this principle. The first time it occurs to my notice on the inquiries I have been able to make in the institutes of our own country respecting matters of this nature, except what occurs in the Black Book of the Admiralty, is in the order of council, 1664, art. 12, which directs, 'That when any ship, met withal by the royal navy or other ship commissionated, shall fight or make resistance, the ship and goods shall be adjudged lawful prize.' A similar article occurs in the proclamation of 1672. I am, therefore, warranted in saying, that it was the rule and the undisputed rule of the British admiralty. I will not say that the rule may not have been broken in upon, in some instances, by considerations of comity or of policy, by which it may be fit that the administration of this species of law should be tempered in the hands of those tribunals which have a right to entertain and apply them; for no man can deny that a State may recede from its extreme rights, and that its supreme councils are authorized to determine in what cases it may be fit to do so, the particular captor having, in no case, any other right and title than what the State itself would possess under the same facts of capture. But I stand with confidence upon all principles of reason, — upon the distinct authority of Vattel, — upon the institutes of other great maritime countries, as well as those of our own country, when I venture to lay it down that, by the law of nations, as now understood, a deliberate and continued resistance to search, on the part of a neutral vessel, to a lawful cruiser, is followed by the legal consequence of confiscation." [1]

The judgment of condemnation pronounced in this case was followed by the treaty of armed neutrality, entered into by the Baltic powers, in 1800, which league was dissolved by the death of the Emperor Paul; and the points in controversy between those powers and Great Britain were finally adjusted by the convention of 5th June, 1801. By the 4th article of this convention, the right of search as to merchant vessels sailing under neutral

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[1] Robinson's Adm. Rep. vol. i. p. 340. The Maria.

convoy was modified, by limiting it to public ships of war of the belligerent party, excluding private armed vessels. Subject to this modification, the pretension of resisting by means of convoy the exercise of the belligerent right of search, was surrendered by Russia and the other northern powers, and various regulations were provided to prevent the abuse of that right to the injury of neutral commerce. As has already been observed, the object of this treaty is expressly declared by the contracting parties, in its preamble, to be the settlement of the differences which had grown out of the armed neutrality by "an invariable determination of their principles upon the rights of neutrality in their application to their respective monarchies." The 8th article also provides that "the principles and measures adopted by the present act, shall be alike applicable to all the maritime wars in which one of the two powers may be engaged, whilst the other remains neutral. These stipulations shall consequently be regarded as permanent, and shall serve as a constant rule for the contracting parties in matters of commerce and navigation." [1] (*a*)

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[1] The question arising out of the case of the Swedish convoy gave rise to several instructive polemic essays. The judgment of Sir W. Scott was attacked by Professor J. F. W. Schlegel, of Copenhagen, in a Treatise on the Visitation of Neutral Ships under Convoy, transl. London, 1801; and vindicated by Dr. Croke in "Remarks on M. Schlegel's Work," 1801. See also "Letters of Sulpicius on the Northern Confederacy," London, 1801. "Substance of the Speech of Lord Grenville in the House of Lords, November 13, 1801," London, 1802. Wheaton's Hist. Law of Nations, pp. 390–420.

(*a*) [As neutral vessels, under the existing regulations of all the belligerents during the present war, give immunity to enemy's goods, the visitation must be limited to an inquiry, with a view to the seizure of such contraband goods, as may be on board of neutral vessels bound to an enemy's port and to ascertaining the vessel's neutrality.

The treaty of 1801 was annulled, in consequence of the second attack upon Copenhagen and the destruction of the Danish fleet; and the Russian government published, the 26th of October, 1807, a declaration, proclaiming "anew the principles of the armed neutrality, the monument of the wisdom of the Empress Catharine." The maritime convention has since received no sanction in any international stipulations, to which England was not a party. The recent orders and decrees of the belligerents are silent as to convoy. The treaties which the United States made with France, of 30th September, 1800, with Columbia of 3d of October, 1824, with Brazils of 12th December, 1828, with Mexico of 5th of April, 1831, with Chili of 16th of May, 1832, with Peru-

§ 30. Forcible resistance by an enemy master.

In the case of The Maria, the resistance of the convoying ship was held to be a resistance of the whole fleet of merchant vessels under convoy, and subjected the whole to confiscation. This was a case of neutral property condemned for an attempted resistance by a neutral armed vessel to the exercise of the right of visitation and search, by a lawfully commissioned belligerent cruiser. But the forcible resistance by an enemy master will not, in general, affect neutral property laden on board an enemy's merchant vessel; for an attempt on his part to rescue his vessel from the possession of the captor, is nothing more than the hostile act of a hostile person, who has a perfect right to make such an attempt. "If a *neutral* master," says Sir W. Scott, "attempts a rescue, or to withdraw himself from search, he violates a duty which is imposed upon him by the law of nations, to submit to search, and to come in for inquiry as to the property of the ship or cargo; and if he violates this obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner; and it would, I think, extend also to the whole property intrusted to his care, and thus fraudulently attempted to be withdrawn from the operation of the rights of war. With an *enemy* master, the case is very different; no duty is violated by such an act on his part — *lupum auribus teneo*, and if he can withdraw himself he has a right so to do."[1]

Bolivia of 13th November, 1836, and with Venezuela of 20th January, 1836, all provide that in case of convoy, "the declaration of the commander of the convoy, that the vessels under his protection belong to the nation, whose flag he carries, and, when they are bound to an enemy's port, that they have no contraband goods on board, shall be sufficient." U. S. Stat. at Large, vol. viii. p. 188, 316, 395, 420, 438, 493, 478. Ortolan comes to the conclusion that, independently of treaties, neither the ships of war nor privateers of a belligerent have a right to visit vessels under the convoy of a vessel of war of their own nation, but that the declaration of the commander is sufficient. Ortolan, Diplomatie de la Mer, tom. ii. ch. 7, tom. ii. p. 240, 2ème edit. Such, also, is the doctrine of the other modern continental text writers. See De Martens, Essai sur les Armateurs, ch. 2. De Rayneval, De la Liberté de la Mer, tom. i. c. 18. Klüber, Droit des Gens Moderne, tom. ii. sec. 2, ch. 5, § 293. Even Manning, who holds to the old rules of English admiralty law, while he denies that neutrals, under convoy, can claim to be exempted from search, as a matter of right, deems it desirable that it should be accorded to them by agreement. Manning's Commentaries of the Law of England, p. 360.]

[1] Robinson's Adm. Rep. vol. v. p. 232. The Catharina Elizabeth.

§ 31. Right of a neutral to carry his goods in an *armed* enemy vessel.

The question how far a neutral merchant has a right to lade his goods on board an armed enemy vessel, and how far his property is involved in the consequences of resistance by the enemy master, was agitated both in the British and American prize courts, during the last war between Great Britain and the United States. In a case adjudged by the Supreme Court of the United States, in 1815, it was determined, that a neutral had a right to charter and lade his goods on board a belligerent armed merchant ship, without forfeiting his neutral character, unless he actually concurred and participated in the enemy master's resistance to capture.[1] (*a*) Contemporaneously with this decision of the American court, Sir W. Scott held directly the contrary doctrine, and decreed salvage for the recapture of neutral Portuguese property, previously taken by an American cruiser from on board an armed British vessel, upon the ground that the American prize courts might justly have condemned the property.[2] In reviewing its former decision, in a subsequent case adjudged in 1818, the American court confirmed it; and, alluding to the decisions in the English High Court of Admiralty, stated, that if a similar case should again occur in that court, and the decisions of the American court should in the mean time have reached the learned judge, he would be called upon to acknowledge that the danger of condemnation in the United States courts was not as great as he had imagined. In determining the last-mentioned

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[1] Cranch's Rep. vol. ix. p. 388. The Nereide.

(*a*) [See dissenting opinion, in this case, of Story, Justice, referred to in Wildman's International Law, vol. ii. p. 126, where on its authority the opposite principle is stated as American law. This same dissenting opinion will be found cited in the remarks connected with the negotiations of Mr. Wheaton, which resulted in the treaty of indemnity with Denmark. Vide infra, § 32, note. The question could not practically arise in France, before the assimilation in the present war of the Maritime Codes of the allies, as where the nationality of the cargo followed that of the ship the lading of neutral goods, on board of an enemy's ship, whether armed or not, would have equally subjected them to capture and condemnation. Ortolan states the contradictory English and American decisions, and Hautefeuille sustains on principle the American against that of Sir William Scott. Diplomatie de la Mer, liv. iii. ch. 7, p. 225, 2ème ed. Droits des Nations Neutres, tom. iii. p. 420.]

[2] Dodson's Adm. Rep. vol. i. p. 443. The Fanny.

case, the American court distinguished it both from those where neutral vessels were condemned for the unneutral act of the convoying vessel, and those where neutral vessels had been condemned for placing themselves under enemy's convoy. With regard to the first class of cases, it was well known that they originated in the capture of the Swedish convoy, at the time when Great Britain had resolved to throw down the glove to all the world, on the contested principles of the northern maritime confederacy. But, independently of this, there was several considerations which presented an obvious distinction between both classes of cases and that under consideration. A convoy was an association for a hostile object. In undertaking it, a State spreads over the merchant vessels an immunity from search which belongs only to a national ship; and by joining a convoy, every individual vessel puts off her pacific character, and undertakes for the discharge of duties which belong only to the military marine. If, then, the association be voluntary, the neutral, in suffering the fate of the entire convoy, has only to regret his own folly in wedding his fortune to theirs; or if involved in the resistance of the convoying ship, he shares the fate to which the leader of his own choice is liable in case of capture.[1]

§ 32. Neutral vessels under enemy's convoy, liable to capture?

The Danish government issued, in 1810, an ordinance relating to captures, which declared to be good and lawful prize "such vessels as, notwithstanding their flag is considered neutral, as well with regard to Great Britain as the powers at war with the same nation, still, either in the Atlantic or Baltic, have made use of English convoy." Under this ordinance, many American neutral vessels were captured, and, with their cargoes, condemned in the Danish prize courts for offending against its provisions. In the course of the discussions which subsequently took place between the American and Danish governments respecting the legality of these condemnations, the principles upon which the ordinance was grounded were questioned by the United States government, as inconsistent with the established rules of international law. It was insisted that the prize ordinances of Denmark, or of any other

[1] Wheaton's Rep. vol. iii. p. 409. The Atalanta.

particular State, could not make or alter the general law of nations, nor introduce a new rule binding on neutral powers. The right of the Danish monarch to legislate for his own subjects and his own tribunals, was incontestible; but before his edicts could operate upon foreigners carrying on their commerce upon the seas, which are the common property of all nations, it must be shown that they were conformable to the law by which all are bound. It was, however, unnecessary to suppose, that in issuing these instructions to its cruisers, the Danish government intended to do any thing more than merely to lay down rules of decision for its own tribunals, conformable to what that government understood to be just principles of public law. But the observation became important when it was considered, that the law of nations nowhere existed in the written code accessible to all, and to whose authority all deferred; and that the present question regarded the application of a principle (to say the least) of doubtful authority, to the confiscation of neutral property for a supposed offence committed, not by the owner, but by his agent the master, without the knowledge or orders of the owner, under a belligerent edict, retrospective in its operation, because unknown to those whom it was to affect.

The principle laid down in the ordinance, as interpreted by the Danish tribunals, was, that the fact of having navigated under enemys' convoy is, *per se*, a justifiable cause, not of capture merely, but of condemnation in the courts of the other belligerent; and *that*, without inquiring into the proofs of proprietary interest, or the circumstances and motives under which the captured vessel had joined the convoy, or into the legality of the voyage, or the innocence of her conduct in other respects. A belligerent pretension so harsh, apparently so new, and so important in its consequences, before it could be assented to by the neutral States, must be rigorously demonstrated by the authority of the writers on public law, or shown to be countenanced by the usage of nations. Not one of the numerous expounders of that law even mentioned it; no belligerent nation had ever before acted upon it; and still less could it be asserted that any neutral nation had ever acquiesced in it. Great Britain, indeed, had contended that a neutral State had no right to resist the exercise of the belligerent claim of visitation and search by means of convoys *consisting of its own ships of war*. But the

records even of the *British* courts of admiralty might be searched in vain for a precedent to support the principle maintained by Denmark, that the mere fact of having sailed under a belligerent convoy is, in all cases and under all circumstances, conclusive cause of condemnation.

The American vessels in question were engaged in their accustomed lawful trade, between Russia and the United States; they were unarmed, and made no resistance to the Danish cruisers; they were captured on the return voyage, after having passed up the Baltic and been subjected to examination by the Danish cruisers and authorities; and were condemned under an edict which was unknown, and consequently, as to them, did not exist when they sailed from Cronstadt, and which, unless it could be strictly shown to be consistent with the preëxisting law of nations, must be considered as an unauthorized measure of retrospective legislation. To visit upon neutral merchants and mariners extremely penal consequences from an act, which they had reason to believe to be innocent at the time, and which is not pretended to be forbidden by a single treaty or writer upon public law, by the general usage of nations, or even by the practice of any one belligerent, or the acquiescence of any one neutral State, must require something more than a mere resort to the supposed analogy of other acknowledged principles of international law, but from which it would be vain to attempt to deduce that now in question as a corollary.

Being found in company with an enemy's convoy might, indeed, furnish a *presumption* that the captured vessel and cargo belonged to the enemy, in the same manner as goods taken in an enemy's vessel are presumed to be enemy's property until the contrary is proved; but this presumption is not of that class of presumptions called *presumptiones juris et de jure*, which are held to be conclusive upon the party, and which he is not at liberty to controvert. It is a slight presumption only, which will readily yield to countervailing proof. One of the proofs which, in the opinion of the American negotiator, ought to have been admitted by the prize tribunal to countervail this presumption, would have been evidence that the vessel had been compelled to join the convoy; or that she had joined it, not to protect herself from examination by Danish cruisers, but against others, whose notorious conduct and avowed principles render it certain, that cap-

tures by them would inevitably be followed by condemnation. It followed, then, that the simple fact of having navigated under British convoy could be considered as a ground of suspicion only, warranting the captors in sending in the captured vessel for further examination, but not constituting in itself a conclusive ground of confiscation.

Indeed it was not perceived how it could be so considered, upon the mere ground of its interfering with the exercise of the belligerent pretension of visitation and search, by a State, which, when neutral, had asserted the right of protecting its private commerce against belligerent visitation and search by armed convoys of its own public ships.

Nor could the consistency of the Danish government, in this respect, be vindicated, by assuming a distinction between the doctrine maintained by Denmark, when neutral, against Great Britain, from that which she sought, as a belligerent to enforce against America. Why was it that navigating under the convoy of a *neutral* ship of war was deemed a conclusive cause of condemnation? It was because it tended to impede and defeat the belligerent right of search — to render every attempt to exercise this lawful right a contest of violence — to disturb the peace of the world, and to withdraw from the proper forum the determination of such controversies by forcibly preventing the exercise of its jurisdiction.

The mere circumstance of sailing in company with a *belligerent* convoy had no such effect; being an *enemy*, the belligerent had *a right to resist.* The masters of the vessels under his convoy could not be involved in the consequences of that resistance, because they were neutral, and had not actually participated in the resistance. They could no more be involved in the consequences of a resistance by the belligerent, which is his own lawful act, than is the neutral shipper of goods on board a belligerent vessel for the resistance of the master of that vessel, or the owner of neutral goods found in a belligerent fortress for the consequences of its resistance.

The right of capture in war extends only to things actually belonging to the enemy, or such as are considered as constructively belonging to him, because taken in a trade prohibited by the laws of war, such as contraband property taken in breach of blockade, and other analogous cases; but the property now in

question was neither constructively nor actually the property of the enemy of Denmark. It was not pretended that it was actually his property, and it could not be shown to have been constructively his. If, indeed, these American vessels had been armed; if they had thus contributed to augment the force of the belligerent convoy; or if they had actually participated in battle with the Danish cruisers, — they would justly have fallen by the fate of war, and the voice of the American government would never have been raised in their favor. But they were, in fact, unarmed merchantmen; and far from increasing the force of the British convoying squadron, their junction tended to weaken it by expanding the sphere of its protecting duty; and instead of participating in the enemy's resistance, in fact there was no battle and no resistance, and the merchant vessels fell a defenceless prey to the assailants.

The illegality of the act on the part of the neutral masters, for which the property of their owners had been confiscated, must then be sought for in a higher source, and must be referred back to the circumstance of *their joining the convoy.* But why should this circumstance be considered illegal, any more than the fact of a neutral taking shelter in a belligerent port, or under the guns of a belligerent fortress which is subsequently invested and taken? The neutral cannot, indeed, seek to escape from visitation and search by *unlawful* means, either of force or fraud; but if, by the use of any lawful and innocent means, he may escape, what is to hinder his resorting to such means for the purpose of avoiding a proceeding so vexatious? The belligerent cruisers and prize courts had not always been so moderate and just as to render it desirable for the neutral voluntarily to seek for an opportunity of being examined and judged by them. Upon the supposition, indeed, that justice was administered promptly, impartially, and purely in the prize tribunals of Denmark, the American shipmasters could have had no motive to avoid an examination by Danish cruisers, since their proofs of property were clear, their voyages lawful, and they were not conscious of being exposed to the slightest hazard of condemnation in these tribunals. Indeed, some of these vessels had been examined on their voyage up the Baltic, and acquitted by the Danish courts of admiralty. Why, then, should a guilty motive be imputed to them, when their conduct could be more naturally explained by an innocent one?

Surely, in the multiplied ravages to which neutral commerce was then exposed on every sea, from the sweeping decrees of confiscation fulminated by the great belligerent powers, the conduct of these parties might be sufficiently accounted for, without resorting to the supposition that they meant to resist or even to evade the exercise of the belligerent rights of Denmark.

Even admitting, then, that the neutral American had no right to put himself under convoy or in order to avoid the exercise of the right of visitation and search by a *friend*, as Denmark professed to be, he had still a perfect right to defend himself against his *enemy*, as France had shown herself to be, by her conduct, and the avowed principles upon which she had declared open war against all neutral trade. Denmark had a right to capture the commerce of her enemy, and for that purpose to search and examine vessels under the neutral flag, whilst America had an equal right to protect her commerce against French capture by all the means allowed by the ordinary laws of war between enemies. The exercise of this perfect right could not legally be affected by the circumstance of the war existing between Denmark and England, or by the alliance between Denmark and France. America and England were at peace. The alliance between Denmark and France was against England, not against America; and the Danish government, which had refused to adopt the decrees of Berlin and Milan as the rule of its conduct towards neutrals, could not surely consider it culpable on the part of the American shipmasters to have defended themselves against the operation of these decrees by every means in their power. If the use of any of these means conflicted in any degree with the belligerent rights of Denmark, that was an incidental consequence, which could not be avoided by the parties without sacrificing their incontestible right of self-defence.

But it might perhaps be said, that as resistance to the right of search is, by the law and usage of nations, a substantive ground of condemnation *in the case of the master of a single ship*, still more must it be so, where *many vessels are associated* for the purpose of defeating the exercise of the same right.

In order to render the two cases stated perfectly analogous, there must have been an actual resistance on the part of the vessels in question, or, at least, on the part of the enemy's fleet, having them at the time under its protection, so as to connect

them inseparably with the acts of the enemy. Here was no *actual* resistance on the part of either, but only a *constructive* resistance on the part of the neutral vessels, implied from the fact of their having joined the enemy's convoy. This, however, was, at most, a *mere intention to resist*, never carried into effect, which had never been considered in the case of a single ship, as involving the penalty of confiscation. But the resistance of the master of a single ship, which is supposed to be analogous to the case of convoy, must refer to a *neutral* master, whose resistance would, by the established law of nations, involve both ship and cargo in the penalty of confiscation. The same principle would not, however, apply to the case of an *enemy*-master, who has an incontestible right to resist his enemy, and whose resistance could not affect the *neutral owner of the cargo*, unless he was on board, and actually participated in the resistance. Such was, in a similar case, the judgment of Sir W. Scott. So also the right of a neutral to transport his goods on board even of an *armed* belligerent vessel, was solemnly affirmed by the decision of the highest judicial tribunal in the United States, during the late war with Great Britain, after a most elaborate discussion, in which all the principles and analogies of public law bearing upon the question were thoroughly examined and considered.

The American negotiator then confidently relied upon the position assumed by him — that the entire silence of all the authoritative writers on public law, as to any such exception to the general freedom of neutral navigation, laid down by them in such broad and comprehensive terms, and of every treaty made for the special purpose of defining and regulating the rights of neutral commerce and navigation, constituted of itself a strong negative authority to show, that no such exception exists, especially as that freedom is expressly extended to every case which has the slightest resemblance to that in question. It could not be denied that the goods of a friend, found in an enemy's fortress, are exempt from confiscation as prize of war; that a neutral may lawfully carry his goods in an armed belligerent ship; that the neutral shipper of goods on board an enemy's vessel, (armed or unarmed,) is not responsible for the consequences of resistance by the enemy-master. How then could the neutral owner, both of ship and cargo, be responsible for the acts of the belligerent convoy, under the protection of which his property had been

placed, not by his own immediate act, but by that of the master proceeding without the knowledge or instructions of the owner?

Such would certainly be the view of the question, even applying to it the largest measure of belligerent rights ever assumed by any maritime State. But when examined by the milder interpretations of public law, which the Danish government, in common with the other northern powers of Europe had hitherto patronized, it would be found still more clear of doubt. If, as Denmark had always insisted, a neutral might lawfully arm himself against all the belligerents; if he might place himself under the convoying force of his own country, so as to defy the exercise of belligerent force to compel him to submit to visitation and search on the high seas; the conduct of the neutral Americans who were driven to take shelter under the floating fortresses of the enemy of Denmark, not for the purpose of resisting the exercise of her belligerent rights, but to protect themselves against the lawless violence of those, whose avowed purpose rendered it certain, that, notwithstanding this neutrality, capture would inevitably be followed by condemnation, would find its complete vindication in the principles which the public jurists and statesmen of that country had maintained in the face of the world. Had the American commerce in the Baltic been placed under the protection of the public ships of war of the United States, as it was admitted it might have been, the belligerent rights of Denmark would have been just as much infringed as they were by what actually happened. In that case, the Danish cruisers must, upon Danish principles, have been satisfied with the assurance of the commander of the American convoying squadron, as to the neutrality of the ships and cargoes sailing under his protection. But that assurance could only have been founded upon their being accompanied with the ordinary documents found on board of American vessels, and issued by the American government upon the representations and proofs furnished by the interested parties. If these might be false and fraudulent in the one case, so might they be in the other, and the Danish government would be equally deprived of all means of examining their authenticity in both. In the one, it would be deprived of those means by its own voluntary acquiescence in the statement of the commander of the convoying squadron, and in the other, by the

presence of a superior enemy's force, preventing the Danish cruisers from exercising their right of search. This was put for the sake of illustration, upon the supposition that the vessels under convoy had escaped from capture; for upon that supposition only could any *actual* injury have been sustained by Denmark as a belligerent power. Here they were captured without any hostile conflict, and the question was, whether they were liable to confiscation for having navigated under the enemy's convoy, notwithstanding the neutrality of the property and the lawfulness of their voyage in other respects.

Even supposing, then, that it was the intention of the American shipmasters, in sailing with the British convoy, to escape from Danish as well as French cruisers, that intention had failed of its effect; and it might be asked, what belligerent right of Denmark had been practically injured by such an abortive attempt? If any, it must be the right of visitation and search. But that right is not a substantive and independent right, with which belligerents are invested by the law of nations for the purpose of wantonly vexing and interrupting the commerce of neutrals. It is a right growing out of a greater right of capturing enemy's property, or contraband of war, and to be used, as means to an end, to enforce the exercise of that right. Here the actual exercise of the right was never in fact opposed, and no injury had accrued to the belligerent power. But it would, perhaps, be said, that it might have been opposed and actually defeated, had it not been for the accidental circumstance of the separation of these vessels from the convoying force, and that the entire commerce of the world with the Baltic Sea might thus have been effectually protected from Danish capture. And it might be asked in reply, what injury would have resulted to the belligerent rights of Denmark from that circumstance? If the property were neutral, and the voyage lawful, what injury would result from the vessels escaping from examination? On the other hand, if the property were enemy's property, its escape must be attributed to the superior force of the enemy, which, though a *loss*, could not be an *injury* of which Denmark would have a lawful right to complain. Unless it could be shown that a neutral vessel navigating the seas is bound *to volunteer to be searched* by the belligerent cruisers, and that she had no right to avoid search by any means whatever, it was apparent that she

might avoid it by any means not unlawful. Violent resistance to search, rescue after seizure, fraudulent spoliation or concealment of papers, are all avowedly unlawful means, which, unless extenuated by circumstances, may justly be visited with the penalty of confiscation. Those who alleged that sailing under belligerent convoy was also attended with the same consequences, must show it, by appealing to the oracles of public law, to the text of treaties, to some decision of an international tribunal, or to the general practice and understanding of nations.[1]

The negotiation finally resulted in the signature of a treaty, in 1830, between the United States and Denmark, by which the latter power stipulated to indemnify the American claimants generally for the seizure of their property by the payment of a fixed sum *en bloc*, leaving it to the American government to apportion it by commissioners appointed by itself, and authorized to determine "according to the principles of justice, equity, and the law of nations," with a declaration that the convention, having no other object than to terminate all the claims, "can never hereafter be invoked, by one party or the other, as a precedent or rule for the future." [2] (*a*)

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[1] Mr. Wheaton to Count Schimmelmann, 1828.

[2] Martens, Nouveau Recueil, tom. viii. p. 350. Elliot's American Diplomatic Code, vol. i. p. 453.

(*a*) [The Danish Commissioners, in their reply, in reference to the vessels under convoy, said: — "They first submit to an examination before they are received under convoy, decline to submit to search by the other belligerent, and are defended by the convoy, if of superior force, or endeavor to escape during the contest, as the Americans generally did. If worsted, they still claim their neutrality. Is it neutrality to accord the right of visitation to one belligerent and refuse it to the other? If one belligerent was predominant, neutrals, by putting themselves under its protection, would, always, avoid the visitation of the other." M. de Redtz, whose memoir, prepared for the Danish government, was inclosed in Mr. Wheaton's despatch of April 9, 1830, also thus refers, in this connection, to the use which England made of American vessels to obtain naval stores from Russia. "After having made the purchases in Russia, these vessels assembled on the coast of Sweden, where they met British ships of war, which convoyed them during the remainder of their voyage, or as far as they had any danger to apprehend. Denmark saw, every day, along her coast, and even within the waters to which her jurisdiction extended, numerous convoys protected by English vessels; and it is contended that, if she was able to surprise these convoys, or some of the vessels belonging to them, they should be liberated on the presentation of American

papers, declaring the neutral character and destination of the vessels. All the vessels seized were in this category, though it is not denied that forged documents were frequently used. The offence against the belligerent party is committed whenever the contract is concluded with the chief of the convoy; nor is it material whether the master acted on his own suggestion, or in accordance with instructions. That is an inquiry never made, in the case of a vessel breaking a blockade or transporting enemy's troops. The only point to be established is, whether the neutral was voluntarily under enemy's convoy. The order of the 28th of May, 1810, was only an instruction to cruisers; and the right of capture, it was admitted, did not depend on the application of the principle, but on the principle itself." It was also maintained, in defence of some of the captures, "that Denmark and her allies, including Russia, constituted a belligerent corps or association in the war against England. They engaged with each other to prohibit all trade between their States and the common enemy. The neutral who violated the prohibition as to one, violated it as to all, and rendered his property taken in this unlawful commerce liable to confiscation by any of the allied powers. England refuses to substitute for a search of the merchantmen the word of honor of the officer of a neutral convoy; and contends that such a modification of the right of visit can only be required by virtue of a particular treaty. Can it be expected that the other belligerent should have the courtesy to consider and treat as neutral vessels, which, to escape a visit and to dispute its indubitable right, may employ the whole marine of the enemy?" The memoir refers to the several treaties by which enemy's ships make enemy's goods, as adopted by the United States, and says that if a different principle has been applied in their tribunals, it must be in the case of those nations which have not adopted this rule towards them. It likewise notices the doubts contained in Mr. Erving's note of June 23, 1811, as to the validity of this claim, as well as a passage to the same effect in Mr. Wheaton's note of July 7, 1828; and concludes by asking whether, under those circumstances, it could be expected that the Danish government would admit that the principle which it had adopted was deemed totally unjust and unjustifiable?

As a general proposition, sailing under enemy's convoy has been assimilated to putting neutral merchandise on board of an armed vessel of the enemy, as to the effect of which the English and American courts differ. The Lords of Appeal in England have decided that sailing under enemy's convoy was a conclusive ground of condemnation. See case of The Sampson, Barney, an American vessel sailing with French cruisers, referred to by Judge Story in the case of The Nereide, Cranch's Rep. vol. ix. p. 442. There has been no direct decision on this subject in the United States, but in the case of The Nereide, Ibid. p. 437, in which it was decided, by a majority of the court, that a neutral cargo, found on board of an enemy's vessel, is not liable as prize of war, the vessel, which was a British armed merchantman, had covenanted to sail under British convoy, though at the time of the capture she was separated from the convoy. Justice Story, in his dissenting opinion, says: — "My judgment is, that the act of sailing under belligerent convoy is a violation of neutrality, and the ship and cargo, if caught *in delicto*, are justly confiscable; and further, that if resistance is necessary, as in my opinion it is not, to perfect the offence, still the resistance of the convoy is, to all purposes, the resistance of the association."

Cranch's Rep. vol. ix. p. 445. And in The Atalanta, Wheat. Rep. vol. iii. p. 423, which was a case of neutral property, on board of an armed enemy's vessel, wherein the decision in the case of The Nereide is affirmed, a distinction is made, which is referred to in the text, § 31, p. 594, between such a case and that of putting a vessel under enemy's convoy, unfavorable to the latter.

This negotiation is thus commented on by subsequent text writers:

"An interesting discussion, on the principle of convoy, occurred in the last war, on a dispute between the United States and Denmark. We have seen that resistance to search by a *neutral*, confiscates his vessel and cargo. On the other hand, resistance to search by an *enemy*, does not entail the confiscation of the neutral goods on board his vessel; the latter resistance violates no duty on the part of the captain, who is right to get away if he can. In 1810, the Danish government issued an ordinance condemning as lawful prize "such vessels as, notwithstanding their flag is considered neutral, as well with regard to Great Britain as the powers at war with the same nation, still, either in the Atlantic or Baltic, have made use of English convoy." Several American vessels were captured, and, with their cargoes, condemned for offending against this ordinance. The Minister of the United States contended that such confiscations were unjust; that the rule laid down by Denmark was an innovation unsupported by any precedent; that the cargoes of the vessels captured were of an innocent nature; and that the joining the British convoy was intended, not to withdraw them from the search of the Danes, but to avoid the being subjected to the decisions of the French prize courts. These latter circumstances would induce a prize court to regard with all possible lenity of construction the case of such captures; but, as to the principle, I think that the Danish ordinance was in perfect conformity with the law of nations. In this opinion I find I am at issue with Dr. Wheaton, who has given an excellent statement of the American positions in the discussion. He has, however, but very slightly noticed the strong positions of the Danish government, and I hope he will pardon my thinking that he has treated this part of his subject more as an advocate than as a judge. He is, however, an author with whom it would always give me more satisfaction to find that I coincide than that I disagree. In the particular case above stated there may have been hardship; but, as far as principle goes, had the case been different, and had the American ships, instead of having innocent cargoes on board, been laden with contraband of war, or with the property of enemies of Denmark, they might, by the escort of the British convoy, have avoided the detention of Danish cruisers of smaller force, and have thus defeated the clear rights of Denmark. As a general principle, I think that the sailing under the convoy of a belligerent must be regarded as a withdrawal from the search of the other belligerent, as a resistance to his rights, and as entailing confiscation as a consequence of such attempted evasion." Manning's Commentaries on the Law of Nations, p. 369. See also, Wildman's International Law, vol. ii. p. 126, which cites, in support of the Danish ordinance, in which he erroneously says that the government of the United States acquiesced, the dissenting opinion of Story, Justice, in the case of The Nereide, as above referred to.

Ortolan says:

"A part les circonstances, qui motivèrent dans le cas ci-dessus, la complète réussite du négotiateur Américain, on ne peut pas dire, à notre avis, que le fait d'un navire neutre naviguant sous le convoi d'un belligérant ne

soit pas un fait irrégulier et même illégal. Un pareil convoi ne peut dans tous les cas, exempter de la visite. Mais si le neutre se joint en pleine mer à un ou à plusieurs navires de guerre belligérants et navigue de conserve avec ces navires sans prétendre à aucune protection de leur part dans la seule espérance de pouvoir échapper pacifiquement et par la fuite à la visite, à la faveur d'une rencontre et d'un combat possible entre les seuls belligérants, c'est là de sa part une ruse innocente qui ne peut lui être imputée à délit, et qui ne peut pas, à elle seule, entrainer la confiscation. C'était là précisément le cas des navires Américains, dont l'action était d'ailleurs excusable par le désir qu'ils avaient d'échapper aux rigueurs extraordinaires des décrets de Napoleon, sur le blocus continental." Diplomatie de la Mer, tom. ii. p. 245, 2ème ed.

Hautefeuille thus refers to the transaction:

"Le gouvernement Américain réclama vivement contre la saisie des navires de ses sujets. L'affaire ne fut terminée que le 28 Mars, 1830. La convention qui intervint entre les parties et par laquelle le Danemark s'engagea à payer une indemnité, aux propriétaires Americains, présente ce caractère remarquable que le gouvernement Danois ne s'est pas départi de sa prétention et stipule que cette indemnité ne pouvait pas être considerée comme un précédent ni servir de régle à l'avenir.

"Le gouvernement Américain fut représenté dans cette négotiation par un diplomate dont j'ai souvent cité les opinions, par Wheaton. Ce publiciste parait convenir que le fait reproché à ses compatriotes les soumettait à une présomption légale, qui a pu motiver leur arrestation; mais il soutient que cette présomption devait céder devant la preuve de leur nationalité. D'ailleurs, ils avaient été saisis au retour, en vertu d'un édit rendu depuis que le délit reproché était consómmé, et qui leur était inconnu." Droits des Nations Neutres, tom. iv. p. 115.]

CHAPTER IV.

TREATY OF PEACE.

§ 1. Power of making peace dependent on the municipal constitution.

The power of concluding peace, like that of declaring war, depends upon the municipal constitution of the State. These authorities are generally associated. In unlimited monarchies, both reside in the sovereign; and even in limited or constitutional monarchies, each may be vested in the crown. Such is the British Constitution, at least in form; but it is well known, that in its practical administration, the real power of making war actually resides in the Parliament, without whose approbation it cannot be carried on, and which body has consequently the power of compelling the crown to make peace, by withholding the supplies necessary to prosecute hostilities. The American Constitution vests the power of declaring war in the two houses of Congress, with the assent of the President. By the forms of the Constitution, the President has the exclusive power of making treaties of peace, which, when ratified with the advice and consent of the Senate, become the supreme law of the land, and have the effect of repealing the declaration of war and all other laws of Congress, and of the several States which stand in the way of their stipulations. But the Congress may at any time compel the President to make peace, by refusing the means of carrying on war. In France the King has, by the express terms of the constitutional charter, power to declare war, to make treaties of peace, of alliance, and of commerce; but the real power of making both peace and war resides in the Chambers, which have the authority of granting or refusing the means of prosecuting hostilities. (*a*)

(*a*) [By the French Constitution of January 14, 1852, the President had the power of declaring war, making treaties of peace, of alliance and of commerce, and he had solely the initiative of all laws. The *projets* of laws were prepared

§ 2. Power of making treaties of peace limited in its extent.

The power of making treaties of peace, like that of making other treaties with foreign States, is, or may be, limited in its extent by the national constitution. We have already seen that a general authority to make treaties of peace necessarily implies a power to stipulate the conditions of peace; and among these may properly be involved the cession of the public territory and other property, as well as of private property included in the eminent domain. If, then, there be no limitation, expressed in the fundamental laws of the State, or necessarily implied from the distribution of its constitutional authorities, on the treaty-making power in this respect, it necessarily extends to the alienation of public and private property, when deemed necessary for the national safety or policy.[1]

The duty of making compensation to individuals, whose private property is thus sacrificed to the general welfare, is inculcated by public jurists, as correlative to the sovereign right of alienating those things which are included in the eminent domain; but this duty must have its limits. No government can be supposed to be able, consistently with the welfare of the whole community, to assume the burden of losses produced by conquest, or the violent dismemberment of the State. Where, then, the cession of territory is the result of coercion and conquest, forming a case of imperious necessity beyond the power of the State to control, it does not impose any obligation upon the government to indemnify those who may suffer a loss of property by the cession.[2]

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by the Council of State and discussed by them, in the name of the government, before the *Corps Législatif* and the Senate. The *Corps Législatif* discussed and voted the *projets* of laws and the taxes, and no law could be promulgated, without being submitted to the Senate. By the *Senatus-Consulte* of November 7, 1852, on the reëstablishment of the imperial dignity, in the person of the Emperor, Napoleon III., the Constitution was maintained in all matters, in which it was not specially altered; and by a *Senatus-Consulte* of December 23, 1852, it was expressly provided that treaties of commerce, made by virtue of the 6th article of the Constitution should have the force of law, in modifying the existing tariffs. Annuaire des Deux Mondes, 1851–2, p. 952. Ibid. 1852–3, pp. 887, 891.]

[1] Vide ante, Pt. III. ch. 2, § 7, p. 329.

[2] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 20, § 7. Vattel, Droit des Gens, liv. i. ch. 20, § 244; liv. iv. ch. 2, § 12. Kent's Comment. on American Law, vol. i. p. 178, 5th ed.

The fundamental laws of most free governments limit the treaty-making power, in respect to the dismemberment of the State, either by an express prohibition, or by necessary implication from the nature of the constitution. Thus, even under the constitution of the old French monarchy, the States-General of the kingdom declared that Francis I. had no power to dismember the kingdom, as was attempted by the Treaty of Madrid, concluded by that monarch; and that not merely upon the ground that he was a prisoner, but that the assent of the nation, represented in the States-General, was essential to the validity of the treaty. The cession of the province of Burgundy was therefore annulled, as contrary to the fundamental laws of the kingdom; and the provincial States of that duchy, according to Mezeray, declared, that "never having been other than subjects of the crown of France, they would die in that allegiance; and if abandoned by the king, they would take up arms, and maintain by force their independence, rather than pass under a foreign dominion." But when the ancient feudal constitution of France was gradually abolished by the disuse of the States-General, and the absolute monarchy became firmly established under Richelieu and Louis XIV., the authority of ceding portions of the public territory, as the price of peace, passed into the hands of the king, in whom all the other powers of government were concentrated. The different constitutions established in France, subsequently to the Revolution of 1789, limited this authority in the hands of the executive in various degrees. The provision in the Constitution of 1795, by which the recently conquered countries on the left bank of the Rhine were annexed to the French territory, became an insuperable obstacle to the conclusion of peace in the conferences at Lisle. By the Constitutional Charter of 1830, the king is invested with the power of making peace, without any limitation of this authority, other than that which is implied in the general distribution of the constitutional powers of the government. Still it is believed that, according to the general understanding of French public jurists, the assent of the Chambers, clothed with the forms of a legislative act, is considered essential to the ultimate validity of a treaty ceding any portion of the national territory. The extent and limits of the territory being defined by the municipal laws, the treaty-making power is not considered sufficient to repeal those laws.

In Great Britain, the treaty-making power, as a branch of the regal prerogative, has in theory no limits; but it is practically limited by the general controlling authority of Parliament; whose approbation is necessary to carry into effect a treaty, by which the existing territorial arrangements of the empire are altered.

In confederated governments, the extent of the treaty-making power, in this respect, must depend upon the nature of the confederation. If the union consists of a system of confederated States, each retaining its own sovereignty complete and unimpaired, it is evident that the federal head, even if invested with the general power of making treaties of peace for the confederacy, cannot lawfully alienate the whole or any portion of the territory of any member of the union, without the express assent of that member. Such was the theory of the ancient Germanic Constitution; the dismemberment of its territory was contrary to the fundamental laws and maxims of the empire; and such is believed to be the actual constitution of the present Germanic Confederation. This theory of the public law of Germany has often been compelled to yield in practice to imperious necessity; such as that which forced the cession to France of the territories belonging to the States of the empire, on the left bank of the Rhine, by the Treaty of Luneville, in 1800. Even in the case of a supreme federal government, or composite State, like that of the United States of America, it may, perhaps, be doubted how far the mere general treaty-making power, vested in the federal head, necessarily carries with it that of alienating the territory of any member of the union without its consent.

§ 3. Effects of a treaty of peace.

The effect of a treaty of peace is to put an end to the war, and to abolish the subject of it. It is an agreement to waive all discussion concerning the respective rights and claims of the parties, and to bury in oblivion the original causes of the war. It forbids the revival of the same war by resuming hostilities for the original cause which first kindled it, or for whatever may have occurred in the course of it. But the reciprocal stipulation of perpetual peace and amity between the parties does not imply that they are never again to make war against each other for any cause whatever. The peace relates to the war which it terminates; and is perpetual, in the

sense that the war cannot be revived for the same cause. This will not, however, preclude the right to claim and resist, if the grievances which originally kindled the war be repeated — for that would furnish a new injury and a new cause of war, equally just with the former. If an abstract right be in question between the parties, on which the treaty of peace is silent, it follows, that all previous complaints and injury, arising under such claim, are thrown into oblivion, by the *amnesty*, necessarily implied, if not expressed; but the claim itself is not thereby settled either one way or the other. In the absence of express renunciation or recognition, it remains open for future discussion. And even a specific arrangement of a matter in dispute, if it be special and limited, has reference only to that particular mode of asserting the claim, and does not preclude the party from any subsequent pretensions to the same thing on other grounds. Hence the utility in practice of requiring a general renunciation of all pretensions to the thing in controversy, which has the effect of precluding for ever the assertion of the claim in any mode.[1]

The treaty of peace does not extinguish claims founded upon debts contracted or injuries inflicted previously to the war, and unconnected with its causes, unless there be an express stipulation to that effect. Nor does it affect private rights acquired antecedently to the war, or private injuries unconnected with the causes which produced the war. Hence debts previously contracted between the respective subjects, though the remedy for their recovery is suspended during the war, are revived on the restoration of peace, unless actually confiscated, in the mean time, in the rigorous exercise of the strict rights of war, contrary to the milder practice of recent times. There are even cases where debts contracted, or injuries committed, between the respective subjects of the belligerent nations during the war, may become the ground of a valid claim, as in the case of ransom-bills, and of contracts made by prisoners of war for subsistence, or in the course of trade carried on under a license. In all these cases, the remedy may be asserted subsequently to the peace.[2] (*a*)

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[1] Vattel, Droit des Gens, liv. iv. ch. 2, §§ 19-21.

[2] Kent's Comment. vol. i. p. 168, 5th ed.

(*a*) ["A state of war abrogates treaties previously existing between the belli-

§ 4. *Uti possidetis* the basis of every treaty of peace, unless the contrary be expressed.

The treaty of peace leaves every thing in the state in which it found it, unless there be some express stipulation to the contrary. The existing state of possession is maintained, except so far as altered by the terms of the treaty. If nothing be said about the conquered coun-

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gerents, and a treaty of peace puts an end to all claims for indemnity for tortious acts committed under the authority of one government against the citizens or subjects of another, unless they are provided for in its stipulations." President's Message. Annual Register for 1847, p. 407. Thus the Treaty of the 6th of February, 1853, for the adjustment of private claims of citizens of the United States on the government of Great Britain, and of subjects of Great Britain on that of the United States, was limited to such as arose subsequently to the treaty of peace of the 24th December, 1814. Treaties of the United States, 1854, p. 110.

As to the character of the difficulties with France, in 1798–9 — the Supreme Court, premising that "Congress had raised an army, stopped all intercourse with France, dissolved our treaties, built and equipped ships of war, and commissioned private armed ships, enjoining the former and authorizing the latter to defend themselves against the armed ships of France, to attack them on the high seas, to subdue and take them as prize, and to recapture vessels found in their possession," declared that a public war, though an imperfect war, existed between the two nations, and that they were enemies to one another. The Court accordingly awarded salvage of one half, as for a recapture from an enemy, in the case of an American vessel, captured by a French privateer and recaptured by a public armed American ship. Dallas's Rep. vol. iv. p. 37. Bos *v.* Tingy. See further, as to the effect of this war in extinguishing prior claims, Webster's Works, vol. iv. p. 162. Benton's Thirty Years in the Senate, p. 487. Cong. Globe, 1854–5.

By the second article, as originally proposed, of the Convention of September 30, 1800, for "terminating the differences" between the United States and France, between whom, as stated, actual hostilities then existed, it was stipulated that the parties would negotiate further, respecting the treaties of alliance and of commerce of 1778, and of the consular convention of 1788, and upon "the indemnities mutually due and claimed." This article the Senate, in ratifying the treaty, expunged; and, at the same time, notwithstanding the perpetual character of its first article, which, as is usual at the close of a war, declared that there should be "a firm, inviolable, and universal peace between the French Republic and the United States," they limited the duration of the whole treaty, without an exception even of that article, to eight years. The First Consul, in ratifying it, added as a proviso, "that by this retrenchment the two States renounce the respective pretensions, which are the object of the said article." In this form the ratifications were exchanged in Paris. Mr. Madison, Secretary of State, wrote to Mr. Livingston, Minister to France, 18th December, 1801: — "I am authorized to say, that the President does not regard the declaratory clause as more than a legitimate inference from the rejection by the Senate of the second article." Cong. Doc. 19th Cong. 1st Sess. No. 122, p. 703. President Jefferson,

try or places, they remain with the conqueror, and his title cannot afterwards be called in question. During the continuance of

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however, deemed it advisable to submit the convention anew to that body. The Senate, taking the same view of it as he did, resolved that they considered the convention duly ratified, and returned the same to the President for the usual promulgation. U. S. Statutes at Large, vol. viii. p. 194. The treaty thus stood, it is conceived, when promulgated, as respects the subject of the second article, precisely as it would have done, if that article had never been contained in it; and, moreover, by the express declaration of both governments, its omission was tantamount to a renunciation of the pretensions to which it refers, whatever the effect, in other respects, of the limitation, as to the duration of the treaty, might be. In a case, arising under the Treaty of 1819, with Spain, the Supreme Court held, "That where one of the parties to a treaty, at the time of its ratification, annexes a written declaration explaining ambiguous language in the instrument, or adding a new and distinct stipulation, and the treaty is afterwards ratified by the other party with the declaration attached to it, and the ratifications duly exchanged, the declaration thus annexed is a part of the treaty, and as binding and obligatory, as if it were inserted in the body of the instrument. The intention of the parties is to be gathered from the whole instrument, as it stood when the ratification were exchanged." Howard's Rep. vol. xvi. p. 650. Doe et al. *v.* Braden.

But the expunging of the second article did not affect the other provisions of the treaty. By the third article the public ships, that had been captured, were to be mutually restored. By the fourth article, it was agreed that "property captured, and not yet definitively condemned, or which may be captured before the exchange of ratifications, (contraband goods destined to an enemy's port excepted,) shall be mutually restored," &c. The proofs, on both sides, to be required in reference to vessel and cargo, are minutely prescribed in the treaty; and it is added: — "This article shall take effect from the date of the signature of the present Convention. And if, from the date of the said signature, any property shall be condemned, contrary to the intent of the said convention, before the knowledge of this stipulation shall be obtained, the property so condemned shall, without delay, be restored or paid for."

The fifth article would seem to be confined to matters of contract, which are not extinguished by a state of war, but are revived at peace. "Art. 5. The debts contracted by one of the two nations with individuals of the other, or by the individuals of one with the individuals of the other, shall be paid, or the payment may be prosecuted, in the same manner as if there had been no misunderstanding between the two States. But this clause shall not extend to indemnities claimed on account of captures or confiscations."

Complaints very soon arose of the non-performance, by France, of the stipulations of these articles, particularly of the fourth article. In a note, 29th Thermidor, year 9, (17th August, 1801,) from M. Talleyrand, Minister of Foreign Affairs, to the Commissary of the Government, near the Council of Prizes, he tells him: "The two nations have guaranteed, the one to the other, the restitution — 1. Of national ships; 2. Of armed or unarmed ships that shall be known to belong to

the war, the conqueror in possession has only a usufructuary right, and the latent title of the former sovereign continues, until

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their citizens, according to the proofs specified in the fourth article, and that without any exception, restriction, or reserve; 3. Of all property forming part of the cargo of said ships, with the only exception of merchandise specified by the thirteenth article, under the denomination of contraband of war, and which shall be destined for the enemy. You will, therefore, solicit the Council to apply, as soon as possible, the provisions of the convention to American prizes, in all that relates to them." Cong. Doc. 19 Cong. 1st Sess. No. 102, p. 555.

The claims under this (fourth) article, as well as those under the fifth, continued to be pressed upon the French government, during the period intervening between the ratification of the Convention of 1800 and the conclusion of the negotiations for the purchase of Louisiana. By one of the conventions of 30th April, 1803, connected with that transaction, 20,000,000 francs were set aside, for the payment of American claims; and it would seem, from the diplomatic correspondence of that period, that it was expected that it would exceed the amount, for which France was justly liable, and be applicable to all subsisting claims. The matter, however, became involved in almost inextricable confusion, by the terms used in the treaty, and the looseness with which it appears to have been drawn. By "Art. 1. The debts due by France to citizens of the United States, contracted before the 8th of Vendemiaire, ninth year of the French Republic, (30th September, 1800,) shall be paid according to the following regulations, with interest at six per cent., to commence from the periods when the accounts and vouchers were presented to the French government." It was declared, by the second article, that "the debts provided for, &c., are those whose result is comprised in the conjectural note, (a,) annexed to the present convention, and which, with the interest, cannot exceed the sum of twenty millions of francs. The claims comprised in the said note, which fall within the exceptions of the following articles, shall not be admitted to the benefit of this provision." "Art. 4. It is expressly agreed that the preceding articles shall comprehend no debts but such as are due to citizens of the United States, who have been and are yet creditors of France, for supplies, embargoes, and for prizes made at sea, in which the appeal has been properly lodged, within the time mentioned in the said convention of the 8th Vendemiaire, ninth year, (30th September, 1800.) Art. 5. The preceding articles shall apply only, first, to captures, of which the Council of Prizes shall have ordered restitution; it being well understood that the claimant cannot have recourse to the United States, otherwise than he might have had to the government of the French Republic, and only in case of the insufficiency of the captors; second, the debts mentioned in the said fifth article of the convention contracted before the 8th Vendemiaire, an 9, (30th September, 1800,) the payment of which has heretofore been claimed of the actual government of France, and for which the creditors have a right to the protection of the United States; the said fifth article does not comprehend prizes whose condemnation has been or shall be confirmed. Art. 10. The rejection of any claim (by the American commissioners appointed under the convention to examine the claims) shall have

the treaty of peace, by its silent operation, or express provisions, extinguishes his title for ever.[1]

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no other effect than to exempt the United States from the payment of it; the French government reserving to itself the right to decide definitively on such claim, so far as it concerns itself." U. S. Statutes at Large, vol. viii. p. 212.

It will be seen, by a reference to the two conventions, that the language of the one of 1803 does not, in terms, describe the claims for which, after the abrogation of the second article, France remained liable to the United States, under the Treaty of 1800. The conjectural note, though not printed in the Statutes of the United States with the treaty to which it was annexed, will be found in Cong. Doc. 19 Cong. 1st Sess. No. 102, at p. 760. It is principally composed of claims for supplies received by the French government, most of which were cases of contract, and for losses sustained at Bordeaux, in consequence of the embargo of 1793, which latter are not embraced within the language of the fifth article of the Convention of 1800; though, as a right to an indemnity against a foreign State attaches to the property, and passes by cession, they may be included in the term "debts," as employed in the fourth article of that of 1803. See Peters's Rep. vol. i. p. 215. Comegys *v.* Vasse. The subject was involved in additional obscurity, by the reference in the preamble of the latter convention, in connection with the fifth article, to the second or abrogated article of the first convention. It would seem, from the contemporaneous correspondence, that many of the cases provided for, though included in the second article, were also within the scope of the fifth, and, therefore, not extinguished by the annulling of the former article. Mr. Livingston, in a letter of 17th April, 1802, to the Minister of Exterior Relations, had said: — "The whole of the fifth article, taken together, amounts to an express stipulation to pay every debt due to individuals, except such as they might claim for indemnities for captures and condemnations, and must have been so construed, had the second article continued in the treaty. On its being erased, the fifth article stands alone as a promise to pay, with the single exception of indemnities for captures and confiscations." Ibid. p. 717.

The difficulty of rendering the two conventions consistent with one another may well be conceded, after the following admission of one of the American Plenipotentiaries: — "Your instructions," says Mr. Livingston, 3d May, 1804, to the Secretary of State, "to negotiate a new explanatory treaty, proceeds upon the idea, that the convention does not include all the *bonâ fide* debts provided for by the Convention of Morfontaine, (30th September, 1800.) Whatever inaccuracy there may be in the expression, it was certainly the intention to make it co-extensive, except so far as to preclude foreigners and foreign property from its provisions. The first article shows clearly that this was the object of the treaty; nor do I think that the subsequent words control, though they certainly somewhat obscure, the sense. The fact was, I had drawn the convention with particular

[1] Grotius, de Jur. Bel. ac Pac. lib. iii. cap. 6, §§ 4, 5. Vattel, Droit des Gens, liv. iii. ch. 13, §§ 197, 198. Martens, Précis du Droit des Gens, liv. iii. ch. 4, § 282. Klüber, Droit des Gens Moderne de l'Europe, §§ 254–259.

The restoration of the conquered territory to its original sovereign, by the treaty of peace, carries with it the restoration of

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attention; it did not exactly meet with Mr. Monroe's ideas, to whom the subject was new; this produced some modifications, and these, again, which would have fully answered our purposes, were struck out by Mr. Marbois's wish to give a preference to debts that had a certain degree of priority in the French bureau. The moment was critical; the question of peace or war was in the balance, and it was important to come to a conclusion before either scale preponderated. I considered the convention as a trifle, compared with the other great object; and I was ready to take it under any form." Ibid. p. 817. As intimated in the preceding extract, Mr. Livingston had been directed, January 31, 1804, "to adjust with the French government a provision for comprehending, in the Convention of 1803, the claims still remaining under the Convention of 1800; and, should the French government refuse to concur in any proposition that will restore the latitude given to claims, as defined by the first convention, and which is narrowed and obscured by the text of the last, it will be proper to settle with the government, if it can be done, such a construction of this text, as will be most favorable to all just claims," &c. Ibid. p. 800. This arrangement was declined; the French Minister of Exterior Affairs, in his note to Mr. Livingston, 6th September, 1804, declaring, that, "in adhering to the dispositions of the treaty, from which his Imperial Majesty will not deviate, any explanatory convention would be superfluous; and the intention of his Imperial Majesty is, to keep from all future questions an affair completely terminated. The Convention of the year 9, (1803,) foresaw the whole case; the whole of the American claims are to be placed to the account of the Federal Government; a list of them has been made. The liquidation of the articles of which it is composed shall be decided before the rest; if it does not reach the sum of twenty millions, other claims will be comprehended therein, but none shall be which exceed this sum, because it is at this point that the two governments are agreed to stop." Ibid. p. 830. The following statement is from a work originally published by the French negotiator of the treaty, the Marquis de Marbois, in 1828: —

"The Convention of the 30th of September, 1800, had for its object the securing of reciprocal satisfaction to the citizens of the two States, and the preventing, as far as possible, of any thing that could for the future affect their good understanding. We there find the principle, the wisdom and legality of which only one nation disputes, 'that free ships make free goods, although they are the property of an enemy.'

"A special promise had been given to pay the debts arising from requisitions, seizures and captures of ships made in time of peace; but the execution of the agreement had not followed the treaty. For two years and a half, the Minister of the United States had been reiterating his reclamations, and demanding in vain the reparation of these losses. The cession of Louisiana afforded the means of realizing promises that had been so long illusory. The Americans consented to pay eighty millions of francs, on condition that twenty millions of this sum should be assigned to the payment of what was due by France to the citizens of the United States.

all persons and things which have been temporarily under the enemy's dominion, to their original state. This general rule is

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"The two (American) ministers fixed this condition of an indemnity at twenty millions of francs, and they probably expected that they would be required to state the grounds of this estimate, in order that they might be discussed and a reduction effected. But no opposition was made, and it was instantly agreed that this amount should be deducted from that of the eighty millions. The intention of extinguishing all former claims was sincere on both sides. The round sum of twenty millions was evidently an estimate formed on reasonable conjecture, and could not be an absolute result established by documents. But the American negotiators agreed, that if there was any difference, the amount rather exceeded than fell short of the claims; and the French Plenipotentiary gave assurances, that in no case should this excess be claimed by France. Thus the respective demands were easily agreed to. A mutual frankness, which smoothed all the difficulties from which the most simple negotiations are not always exempt, was the only address employed by the ministers of either party." Marbois's History of Louisiana, translated by an American Citizen, p. 303.

If any claims reserved by the Treaty of 1800, and not included in that of 1803, were still obligatory on France, they would have been embraced in the general terms of the Convention of the 4th of July, 1831, the first article of which declares, without any limit as to date, the object of the French government, in agreeing to pay the indemnity therein stipulated, to be, "to liberate itself completely from all the reclamations preferred against it by citizens of the United States, for unlawful seizures, captures, sequestrations, confiscations, or destruction of their vessels, cargoes, or other property." And as this fund was to be distributed by the American government "among those interested, in the manner and according to the rules which it shall determine," it rested with them to make the application. U. S. Statutes at Large, vol. viii. p. 430. The language of the Act of July 13, 1832, is, that the Commissioners appointed under it are "to receive and examine all claims which are presented to them under the convention, which are provided for by the said convention, according to the provisions of the same, and the principles of justice, equity, and the law of nations." Ibid. vol. iv. p. 574. The statement of the Commissioners of the classes of cases allowed by them will show that no claims, pretermitted in the Convention of 1800 or existing at the conclusion of that of 1803, were admitted by them; and they thought it necessary particularly to note the allowance of some claims "for property captured, after the signature and before the ratification of the Convention of 1803," because, they say, "that convention had limited the indemnity to cases arising before the 30th of September, 1803." Cong. Doc. Senate, 24 Cong. 1st Sess. No. 161. It has been contended, by those interested in claims supposed to have been omitted in the Treaty of 1800, that the circumstances connected with the expunging of the second article, to which France had already acceded, had given them an equity, as against their own government; and two acts of Congress, providing for the ascertainment of claims of American citizens, for spoliations committed by France prior to the 31st of July, 1801, have been passed, though in both instances they failed to receive

applied, without exception, to real property or immovables. The title acquired in war to this species of property, until confirmed by a treaty of peace, confers a mere temporary right of possession. The proprietary right cannot be transferred by the conqueror to a third party, so as to entitle him to claim against the former owner, on the restoration of the territory to the original sovereign. If, on the other hand, the conquered territory is ceded by the treaty of peace to the conqueror, such an intermediate transfer is thereby confirmed, and the title of the purchaser becomes valid and complete. In respect to personal property or movables, a different rule is applied. The title of the enemy to things of this description is considered complete against the original owner after twenty-four hours' possession, in respect to booty on land. The same rule was formerly considered applicable to captures at sea; but the more modern usage of maritime nations requires a formal sentence of condemnation as prize of war, in order to preclude the right of the original owner to restitution on payment of salvage. But since the *jus postliminii* does not, strictly speaking, operate after the peace; if the treaty of peace contains no express stipulation respecting captured property, it remains in the condition in which the treaty finds it, and is thus tacitly ceded to the actual possessor. The *jus postliminii* is a right which belongs exclusively to a state of war; and therefore a transfer to a neutral, before the peace, even without a judicial sentence of condemnation, is valid, if there has been no recovery or recapture before the peace. The intervention of peace covers all defects of title, and vests a lawful possession in the neutral, in the same manner as it quiets the title of the hostile captor himself.[1]

§ 5. From what time the treaty of peace commences its operation.

A treaty of peace binds the contracting parties from the time of its signature. Hostilities are to cease between them from that time, unless some other period be provided in the treaty itself. But the treaty binds

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the sanction of the President, or to obtain the constitutional majority to enact them, notwithstanding his objection. The first *veto* was interposed by President Polk, on 8th of August, 1846. Senate Journal, 29 Cong. 1st Sess. p. 514. The other was by President Pierce, on 17th February, 1855. Journal H. R. 33d Cong. 2d Sess.]

[1] Vattel, liv. iii. ch. 14, §§ 209, 212, 216. Robinson's Adm. Rep. vol. vi. p. 45. The Purissima Conception. Ibid. p. 138. The Sophia.

the subjects of the belligerent nations only from the time it is notified to them. Any intermediate acts of hostility committed by them before it was known, cannot be punished as criminal acts, though it is the duty of the State to make restitution of the property seized subsequently to the conclusion of the treaty; and, in order to avoid disputes respecting the consequences of such acts, it is usual to provide, in the treaty itself, the periods at which hostilities are to cease in different places. Grotius intimates an opinion that individuals are not responsible, even *civiliter*, for hostilities thus continued after the conclusion of peace, so long as they are ignorant of the fact, although it is the duty of the State to make restitution, wherever the property has not been actually lost or destroyed. But the better opinion seems to be, that wherever a capture takes place at sea, after the signature of the treaty of peace, mere ignorance of the fact will not protect the captor from civil responsibility in damages; and that, if he acted in good faith, his own government must protect him and save him harmless. When a place or country is exempted from hostility by articles of peace, it is the duty of the State to give its subjects timely notice of the fact; and it is bound in justice to indemnify its officers and subjects who act in ignorance of the fact. In such a case it is the actual wrong-doer who is made responsible to the injured party, and not the superior commanding officer of the fleet, unless he be on the spot, and actually participating in the transaction. Nor will damages be decreed by the Prize Court, even against the actual wrong-doer, after a lapse of a great length of time.[1]

When the treaty of peace contains an express stipulation that hostilities are to cease in a given place at a certain time, and a capture is made previous to the expiration of the period limited, but with a knowledge of the peace on the part of the captor, the capture is still invalid; for since constructive knowledge of the peace, after the periods limited in the different parts of the world, renders the capture void, much more ought actual knowledge of the peace to produce that effect. It may, however, be questionable whether any thing short of an official notification from his own government would be sufficient, in such a case, to

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[1] Robinson's Adm. Rep. vol. i. p. 121. The Mentor.

affect the captor with the legal consequences of actual knowledge. And where a capture of a British vessel was made by an American cruiser, before the period fixed for the cessation of hostilities by the Treaty of Ghent, in 1814, and in ignorance of the fact, — but the prize had not been carried *infra præsidia* and condemned, and while at sea was recaptured by a British ship of war, after the period fixed for the cessation of hostilities, but without knowledge of the peace, — it was judicially determined, that the possession of the vessel by an American cruiser was a lawful possession, and that the British recaptor could not, after the peace, lawfully use force to divest this lawful possession. The restoration of peace put an end, from the time limited, to all force; and then the general principle applied, that things acquired in war remain, as to title and possession, precisely as they stood when the peace took place. The *uti possidetis* is the basis of every treaty of peace, unless the contrary be expressly stipulated. Peace gives a final and perfect title to captures without condemnation, and as it forbids all force, it destroys all hope of recovery, as much as if the captured vessel was carried *infra præsidia* and judicially condemned.[1]

§ 6. In what condition things taken are to be restored.

Things stipulated to be restored by the treaty, are to be restored in the condition in which they were first taken, unless there be an express provision to the contrary; but this does not refer to alterations which have been the natural effect of time, or of the operations of war. A fortress or town is to be restored as it was when taken, so far as it still remains in that condition when the peace is concluded. There is no obligation to repair, as well as restore, a dismantled fortress or a ravaged territory. The peace extinguishes all claim for damages done in war, or arising from the operations of war. Things are to be restored in the condition in which the peace found them; and to dismantle a fortification or waste a country after the conclusion of peace, and previously to the surrender, would be an act of perfidy. If the conqueror has repaired the fortifications, and reëstablished the place in the state it was in

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[1] Valin, Traité des Prises, ch. 4, §§ 4, 5. Emérigon, Traité d'Assurance, ch. 12, § 19. Merlin, Répertoire de Jurisprudence, tom. ix. tit. Prise Maritime, § 5. Kent's Comment. vol. i. p. 172, 5th ed.

before the siege, he is bound to restore it in the same condition. But if he has constructed new works, he may demolish them; and, in general, in order to avoid disputes, it is advisable to stipulate in the treaty precisely in what condition the places occupied by the enemy are to be restored.[1]

§ 7. Breach of the treaty.

The violation of any one article of the treaty is a violation of the whole treaty; for all the articles are dependent on each other, and one is to be deemed a condition of the other. A violation of any single article abrogates the whole treaty, if the injured party so elects to consider it. This may, however, be prevented by an express stipulation, that if one article be broken, the others shall nevertheless continue in full force. If the treaty is violated by one of the contracting parties, either by proceedings incompatible with its general spirit, or by a specific breach of any one of its articles, it becomes not absolutely void, but voidable at the election of the injured party. If he prefers not to come to a rupture, the treaty remains valid and obligatory. He may waive or remit the infraction committed, or he may demand a just satisfaction.[2]

§ 8. Disputes respecting its breach how adjusted.

Treaties of peace are to be interpreted by the same rules with other treaties. Disputes respecting their meaning or alleged infraction may be adjusted by amicable negotiation between the contracting parties, by the mediation of friendly powers, or by reference to the arbitration of some one power selected by the parties. This latter office has recently been assumed, in several instances, by the five great powers of Europe, with the view of preventing the disturbance of the general peace, by a partial infraction of the territorial arrangements stipulated by the treaties of Vienna, in consequence of the internal revolutions which have taken place in some of the States constituted by those treaties. Such are the protocols of the conference of London, by which a suspension of hostilities between Holland and Belgium was enforced, and terms of separation

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[1] Vattel, Droit des Gens, liv. iv. ch. 3, § 31.

[2] Grotius, de Jur. Bel. ac Pac. lib. ii. cap. 15, § 15; lib. iii. cap. 19, § 14. Vattel, liv. iv. ch. 4, §§ 47, 48, 54.

between the two countries proposed, which, when accepted by both, became the basis of a permanent peace. The objections to this species of interference, and the difficulty of reconciling it with the independence of the smaller powers, are obvious; but it is clearly distinguishable from that general right of superintendence over the internal affairs of other States, asserted by the powers who were the original parties to the Holy Alliance, for the purpose of preventing changes in the municipal constitutions not proceeding from the voluntary concession of the reigning sovereign, or supposed in their consequences, immediate or remote, to threaten the social order of Europe. The proceedings of the conference treated the revolution, by which the union between Holland and Belgium, established by the Congress of Vienna, had been dissolved, as an irrevocable event; and confirmed the independence, neutrality, and state of territorial possession of Belgium, upon the conditions contained in the Treaty of the 15th November, 1831, between the five powers and that kingdom, subject to such modifications as might ultimately be the result of direct negotiations between Holland and Belgium.[1]

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[1] Wheaton's Hist. Law of Nations, pp. 538–555.

APPENDIX.

APPENDIX, NO. I.

ADDITIONAL NOTE ON NATURALIZATION, BY THE EDITOR.[1]

[By the Constitution of the United States, Congress have power to establish a uniform rule of naturalization; and this power is recognized by the Supreme Court, as being exclusive of that of the individual States. Kent's Commentaries, vol. i. p. 424. Wheaton's Rep. vol. ii. p. 269, Chirac *v.* Chirac. Ibid. vol. v. p. 49, Houston *v.* Moore. The following is the substance of the laws passed by Congress in pursuance of this provision of the Constitution: —

By the act of March 26, 1790, it is provided that any free white alien, who had resided two years within the United States, may become a citizen on application to any court of record of the State where he had resided one year, making proof to the satisfaction of the Court that he is a person of good character, and taking the oath or affirmation prescribed by law, to support the Constitution of the United States; and the minor children of such persons so naturalized, and the children of citizens that may be out of the United States, were to be considered citizens. This act requires no abjuration of former allegiance. United States Statutes at Large, vol. i. p. 103. The act of January 29, 1795, requires a preliminary declaration of intention to become a citizen, and to renounce all foreign allegiance, particularly to the Prince or State of whom the applicant was a subject or citizen, three years before admission, and a residence, at the time of admission, of five years within the United States, and of one year within the State. This act also requires that the alien should renounce any title of nobility, and that the Court admitting him should be satisfied of his good moral character, that he was attached to the principles of the Constitution, and well disposed to the good order and happiness of the same. The aliens, then, residing in the United States, might become citizens on a residence of two years, one of which was in the State where applying, according to the law previously in force, and on complying with the other requirements of the new act. There are the same provisions as before, as to the minor children of naturalized citizens, and the children of citizens born abroad. Ibid. p. 414. By the act of June 18, 1798, no alien could become a citizen, unless he had declared his intention five years before his admission, and proved a residence of fourteen years in the United States, and five years in the State where

[1] See Part II. c. 2, § 5, p. 122, also Introductory Remarks, p. cxvi.

he applied. This law contains a saving in favor of those who became residents during the operation of the previous laws, and who were still to be admitted according to the terms required by them. No alien, a subject or citizen of a State at war with the United States at the time of his application, could be admitted to become a citizen. The declaration, renunciations, and proofs of the former act are retained. Ibid. p. 566. By the act of April 14, 1802, and which is the law now applicable in ordinary cases, a free white person may become a citizen, by declaring, three years before his admission, his intention; and on the Court being satisfied that he has resided, at the time of his admission, five years in the United States, and one year in the State where the Court sits, and complied with the other conditions of abjuration, &c., which are the same as prescribed in the act of 1795. Minor children, whose parents had been naturalized citizens, and children of citizens that had been born out of the United States, were not to be deemed aliens. Ibid. vol. ii. p. 153. By the 12th section of the act of March 3, 1813, "for the regulation of seamen on board the public and private vessels of the United States," five years continuous residence was required for naturalization. Ibid. p. 811. But this provision was repealed, June 26, 1848. Ibid. vol. ix. p. 240. By the act of May 26, 1824, minors, who shall have resided in the United States three years next before they are twenty-one years of age, after a residence of five years, including the three years of minority, may, without having made the previous declaration, be admitted by taking the oath of abjuration, &c., as in other cases. Ibid. vol. iv. p. 69. And, to meet a supposed defect in the act of 1802, by the act of February 10, 1855, persons heretofore born or hereafter to be born out of the United States, whose fathers were, or shall be, at the time of their birth, citizens of the United States, shall be deemed citizens, but the rights of citizenship shall not descend to persons, whose fathers never resided in the United States; and a woman, who might be naturalized under existing laws, who is married, or who shall be married, to a citizen, shall be deemed a citizen.

It will be perceived, by comparing the provisions of these naturalization laws with those of the principal countries of Europe, that our requirements are more severe than theirs; while, with us, not only is an oath of allegiance to the United States required, but what is omitted in the naturalization law of England, and of many other countries, an abjuration of all other princes and States, and especially of the one of which the applicant was a subject or citizen, is necessary. The following decisions under these statutes have been rendered by the Supreme Court of the United States, viz.: — The various acts on the subject of naturalization submit the decision upon the right of aliens to courts of record. They are to receive testimony; to compare it with the law; and to judge both on the law and the fact. If their judgment is entered on record in legal form, it closes all inquiry, and like other judgments, is complete evidence of its own validity. Peter's Rep. vol. iv. p. 393, Spratt *v.* Spratt. It need not appear by the record of naturalization that all the requisites prescribed by law for the admission of aliens to the right of citizenship have been complied with. Cranch's Rep. vol. vii. p. 420, Starke *v.* The Chesapeake Insurance Company. A certificate by a competent court that an alien has taken the oath prescribed by the act respecting naturalization, raises the presumption that the Court was satisfied as to the moral character of the alien, and of his attachment to the principles of the Constitution of the United States. The oath, when taken, confers the right of a citizen. It

is not necessary that there should be an order of court admitting the applicant to be a citizen. Cranch's Rep. vol. vi. p. 176, Campbell *v.* Gordon.

There have been, also, several cases of collective naturalization. By the third article of the first convention of April 30, 1800, with France, for the cession of Louisiana, it is provided that the inhabitants of the ceded territory shall be incorporated into the Union of the United States, and admitted, as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States. Ibid. vol. viii. p. 202. A provision to the same effect is to be found in the 6th article of the treaty of 1819, with Spain, for the purchase of the Floridas. Ibid. p. 256. By the 8th article of the treaty of 1848, with Mexico, those Mexicans who remained in the territories ceded, and who did not declare their intention, within one year, to continue Mexican citizens, were to be deemed citizens of the United States. Ibid. vol. ix. p. 930. By the annexation of Texas, under a resolution of Congress, and its admission into the Union on an equal footing with the original States, all the citizens of the former Republic became citizens of the United States. Ibid. vol. v. p. 798; vol. ix. p. 108.

According to the constitutional jurists of Europe the right of voting, or of being eligible as an elector, is the test of citizenship, or of the droit de cité, and it is, as it will hereafter appear, so recognized by the law of France. Mr. Thorbeck, the learned publicist of Holland, says, in a discourse, entitled "des Droits du citoyen d'aujourdhui," which was translated for the Review of Mr. Fœlix: "Ce qui constitue le caractère distinctif de notre époque, c'est le développement du droit de cité. Dans l'exception la plus large comme dans le sens le plus restreint, ce droit comprend un grand nombre de facultés. Le droit de cité est le droit de voter dans le gouvernement de la commune locale, provinciale on nationale dont on est membre. Dans ce dernier sens, le droit de cité signifie participation au droit de vote dans le gouvernement général, comme membre de l'état. La reconnoissance de la qualité de citoyen comme un droit des membres de l'état dont le droit actuel de représentation du peuple n'est qu' une application, voilà la grande question et la cause du mouvement de notre époque formaliste." Rev. Etr. et Fr. tom. v. p. 383.

But though the power of naturalization be nominally exclusive in the federal government, its operation, in the most important respects, has been made to depend on the action of the individual States, through their constitutions and local laws. The right of suing in the United States courts, in controversies with citizens of other States, is one in which the naturalized citizens only participate with foreigners; while the provisions for common citizenship, intended to be secured throughout the Union, are jeoparded by the comprehensive operation given to the police regulations of the several States. The right of holding real estate is not necessarily connected with citizenship; and in France and other countries of Europe it is possessed by foreigners without naturalization, a privilege which has, also, in the United States, been accorded by treaty stipulations to citizens of other countries. And in those States which by their general laws exclude aliens, special acts are habitually passed for the benefit of individuals, or the right is granted to all, on condition of their complying with certain formalities. The great distinctive characteristic of naturalization, of the droit de cité, the right of voting, of exercising the elective franchise on an equality with native citizens, and without the value of the privilege being diminished by its being shared with

aliens, is practically controlled by the varying constitutions and laws of the several States. The qualifications for voters, even in elections under its provisions, are not prescribed in the Constitution of the United States. Citizenship, however, at the time of the adoption of the Federal Constitution, was, under the State Constitutions then in force, universally a requisite for the electors of the State legislatures, who are, either directly or through these legislatures, made the electors of the two houses of Congress; while the equality with native citizens of all citizens then naturalized was affirmed, in the provision in reference to the Presidency, by which citizens, at the adoption of the Constitution, were excepted from the exclusion applied, in the case of that office, to those that might thereafter be admitted. It might then well have been inferred that, by making the qualifications of electors as to the term of residence, property, payment of taxes, &c., vary in the different States, for which, looking to the diversity in the population of the several sections of the Union, there might have been very good reasons, neither the exclusive right of naturalization by Congress nor the full effect of the exercise of that power would be endangered.

By the Constitution of the United States, it is provided, that the electors for the House of Representatives in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature, (Art. 1, § 2;) that the Senate shall be composed of two senators from each State chosen by the Legislature thereof, § 3; and that each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors equal to the whole number of senators and representatives, to which the State may be entitled in the Congress. Art. 2, § 1. It hence follows, that if the individual States can disfranchise naturalized citizens, (and if they can superadd requirements from them not demanded of natives, it is obvious that they may exclude them altogether from voting,) or if they can admit to the elective franchise those who are not citizens, thereby neutralizing the votes of citizens, not only the federal power over naturalization becomes a nullity, but a minority of actual citizens, by the aid of aliens, may control the government of the States, and, through the States, the government of the Union.

By the Constitution of Rhode Island, Art. 2, § 2, a discrimination is made in the exercise of the elective franchise, between native and naturalized citizens, only the latter being required to have a freehold; while by the Constitution of Illinois, Art. 2, § 27, it is provided that "in all elections, all white male inhabitants above the age of twenty-one years, having resided in the State six months next preceding the election, shall enjoy the right of an elector." In some of the States, the free people of African descent, though they are excluded from the provisions of the naturalization law of Congress, nowhere enjoy, in all respects, equal civil or political privileges with the whites, and have been, by several judicial decisions, declared not to be citizens within the meaning of the Constitution of the United States, are admitted to the elective franchise, either on equal terms with the whites, or, as in New York, on a freehold qualification, according to the rule imposed in Rhode Island, in reference to naturalized citizens. See *inter al.* opinion of Daggett, C. J. of Connecticut, 1833. Meigs's Rep. vol. i. p. 333, State *v.* Clairbone; Mitchill *v.* Lamar, in the U. S. C. C. for Ohio. Opinions of Attorneys-General of U. S. vol. i. p. 382. The power of naturalization is conferred by the act of Congress on Courts of Record, including those of the several

States. It has been made a question how far, even if not repugnant to the Federal Constitution, it be expedient to employ functionaries responsible only to the State Governments for carrying into effect any of the powers confided to that of the United States. One of the States, (Rhode Island,) has (1855) forbidden its courts from performing any of the duties connected with the naturalization of aliens; and there, of course, they must devolve exclusively on the courts of the Union.

Since the act of Parliament, of 1844, 7 and 8 Vict. c. 66, cited Part II. c. 2, § 6, p. 122, note *a*, in every country in Europe the executive branch of the government possesses the power of naturalization. Before the passage of that statute, not only were special acts of Parliament ordinarily required in each case of naturalization, but, owing to a provision originating in the Act of Settlement, of 12 William III. c. 3, and reënacted 1 Geo. I. c. 4, no naturalization bill could be presented to either house of Parliament, unless it contained a clause declaring that the petitioner should be incapable of filling any public office whatever, or of sitting in Parliament, or in the Privy Council. It was, however, sufficient, in order to meet the requirements of the statute that the clause should have been originally inserted, and it might have been subsequently struck out; though in the naturalization of foreign princes and princesses, it was usual, previously, to pass a law specially suspending the operation of the clause. Thus, in the naturalization of Prince Albert, the consort of the present queen, no restrictions were imposed, and he was only required to take the oaths of allegiance and supremacy. By the act of 7 Anne, c. 5, all foreign Protestants might have been naturalized; but this act was repealed by 10 Anne, c. 5, except as regards the children of English parents born abroad. That statute, however, as well as the old one of 25 Ed. 3, required both father and mother to be subjects; but by the act of 4 Geo. c. 2, ch. 21, it is only necessary that the father should be a natural-born subject. Naturalization was also accorded by the king's proclamation, with the restrictions as to holding office contained in the cases passed on by Parliament, to those who had served, in time of war, two years on board a king's ship, and under certain provisions to those engaged in the whale fishery.

By the above act of 7 & 8 Vict. ch. 66, the provisions in previous acts requiring that "no person shall be thereafter naturalized, unless in the bill exhibited for that purpose, there shall be a clause or particular words inserted to declare that such person shall not thereby be enabled to be of the Privy Council or a member of either House of Parliament, or to take any office, either civil or military, or to have any grant of lands, tenements, or hereditaments, from the crown, to himself or any other person in trust for him, and that no bill of naturalization shall hereafter be received in either House of Parliament, unless such clause or words be first inserted," were repealed. That act further provided that every person born of a British mother may hold real or personal estate; that alien friends may hold every species of personal property, except chattels real; that subjects of a friendly State may hold lands, &c., for the purpose of residence, &c., for twenty-one years; that aliens may become naturalized, upon obtaining a certificate, as hereinafter mentioned, and taking the prescribed oath, to disclose conspiracies against the crown, to defend the succession to the crown, as limited to the house of Hanover, and renouncing allegiance unto any other person claiming or pretending a right to the crown of the British realm; but the oath does not contain any abjuration, by the new subjects,

of their original sovereign or country. The certificate is to be obtained on presenting a memorial to the Secretary of State, for the Home Department, and it may give all the rights and capacities of a natural-born citizen, except those of being a member of the Privy Council, or of either House of Parliament. The act also declares, that all who have been naturalized before the act was passed, and who have resided during five consecutive years in the United Kingdom, shall enjoy all the rights, as conferred on aliens by that statute; that women married to natural-born subjects are to be deemed naturalized. For sitting in Parliament or the Privy Council the assent of the Queen and the two Houses of Parliament is necessary; but it was remarked by Lord Brougham, at the time of the passage of this act, that that consent would never be refused, except for good and sufficient reasons; whereas, under the old legislation, a special law must have preliminarily suspended the effect of the prohibitory clause contained in the Act of Settlement, or the bill of naturalization must have been thus amended, after its introduction.

In the Colonies, even during the restrictions on naturalization in England, there were always greater or less facilities accorded. Before our Revolution, all foreign Protestants and Jews, upon their residing seven years in the American colonies, were naturalized as if born in the United Kingdom, with the exception of holding offices; and that even more liberal enactments were not made was, in the declaration of American Independence, assigned as one of the grounds of separation. It it is there stated, as a subject of complaint against the King of Great Britain, that "he has endeavored to prevent the population of these States; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new appropriations of lands."

By the act of July 27, 1847, (10 and 11 Vict. c. 83,) "all acts, statutes, and ordinances heretofore made and enacted by the legislatures of any of Her Majesty's colonies and possessions abroad, for imparting to any person or persons the privileges or any of the privileges of naturalization, to be by such person or persons exercised or enjoyed within the respective limits of such colonies respectively, shall, within such limits, have, and be taken, and reputed to have had, from the time of the enactment thereof respectively, all such and the same force and effect, as doth by law belong to any other law, statute, or ordinance, made or enacted by any such respective legislatures." All laws hereafter to be made by the local legislatures are to have the like effect, but to be subject to allowance or disallowance by Her Majesty.

In France, there has always been a distinction, since naturalization was made a subject of legislation, between the character of a Frenchman, enjoying merely civil rights, and those of a citizen, the attributes of whose character were the possession of political rights. The Code Civil says, liv. i. tit. i, § 7; "The exercise of civil rights is independent of the quality of citizen, which is only acquired and preserved in conformity with the constitutional law." § 8. Every Frenchman shall enjoy civil rights. The code regards as a Frenchman every person born in France, who, within a year after his majority declares his intention to claim the quality of a Frenchman, by complying with the provisions as to residence, and also every child of a Frenchman born in a foreign country. A foreign woman, who marries a Frenchman, follows the condition of her husband. And Pailliet says, writing under the charter of Louis XVIII., "Les droits de citoyen, ou autre-

ment les droits politiques ou de cité consistent dans l'action que la charte accorde aux François qui ont la qualité de citoyen, pour concourir, par leurs votes, à la formation de la chambre des députés et y être éligibles. . . Tout François ne jouit pas des droits politiques ou de cité ; pour en jouir, il ne suffit pas d'être François, il faut encore être citoyen." Manuel de Droit François, p. 9.

From 1789 to 1800 various laws were passed in reference to naturalization, the general purport of which was to accord the civil rights of a Frenchman to every resident, and the political rights to those of them who would take the civic oath, though by some of the constitutions the right of citizenship was accorded without the oath, and in others it was required that persons born foreigners should have married a Frenchwoman, acquired real estate, or performed meritorious services; and in the latter constitutions, a residence in France, more or less extended, was superadded. Among the provisions as to naturalization, adopted during this period, was the law of 9–15 December, 1790, which is still in force, and by which the descendants of persons expatriated on account of their religion, however remote the emigration of their ancestors, are declared Frenchmen, and placed as to political rights, in all respects, in the same category as native-born citizens. Such was the decision of the Chamber of Deputies in 1824 and 1828, on occasion of Benjamin Constant, Roman, and Odier.

The constitutional law, referred to in the 7th section of the Code Civil, is the third article of the Constitution of 22 Frimaire an 8, (13 December, 1799,) by which a foreigner, of the age of twenty-one, who has declared his intention to reside in France, may become, after a residence of ten years, a French citizen. This right is also granted by special decree, without requiring the above delay, for meritorious services or the introduction of valuable improvements, &c.

Another mode of naturalization, in France, was, by the annexation of territory, the retrocession of which, in 1814, has given rise to very grave questions. Several of the decrees of annexation declared the inhabitants of the countries to be French native citizens (*citoyens François nés.*) Fœlix's opinion is, that the result would have been the same, if there had been no such declaration, and his remarks equally apply to the additions which have been, from time to time, made to the territory of the United States, to which we have referred, as cases of collective naturalization. "The naturalization of the inhabitants," says he, "is, as it seems to us, the immediate consequence of every annexation of territories, according to the existing European law of nations; and since it is no longer the custom, even after the conquest of a country, to reduce its inhabitants to a condition inferior to that of the country of the conqueror." Pothier thus lays down the principle: "When a province is united to the crown, its inhabitants must be regarded as native Frenchmen, whether they are born before or after the union." This author adds: "There is even reason to think that the foreigners, who are established in these provinces and who have there obtained, according to the laws in force, the rights of citizenship, must, after the annexation, be considered citizens, equally with the native inhabitants of those provinces, or, at least, with foreigners naturalized in France." Mr. Heffter's language is to the same effect. He regards as citizens or subjects, according to the law of nations, all those who are domiciled in a territory, that is to say, all who have a fixed residence there, whether they are natives or have emigrated; secondly, their wives; thirdly, the children, or other legitimate descendants of a father who is a native of the country, or the natural children of a woman who is a native, even if they are born

abroad, provided those children have not elsewhere established a legal domicile with the consent of their parents. In other words, the dominion of a territory carries with it the subjection of the native inhabitants of that territory, or of those who have their residence there, either in fact or in law, as well as of all their descendants."

There is no example of a law which declares a class of persons to be deprived of their quality of citizens or Frenchmen. But such has been the result of treaties. As their consequence, or, at least, from the exchange of ratifications, the inhabitants of the ceded or separated provinces have ceased to be Frenchmen, and have become citizens of the country with which the territory where they resided has been incorporated. This change of nationality has been effected by the sole force of the treaties, at the moment of their conclusion or ratification.

The treaties of 1814 and 1815 allowed a term of years in which the inhabitants of the ceded territory might decide whether to remain in the country or to quit it with their property. Many different questions have grown out of this provision as to the nationality of these inhabitants during the intervening period. Fœlix, Naturalisation Collection; Perte Collective de la Qualité de François; Rev. Etr. et Fr. N. S. tom. ii. p. 340.

In the States of the Germanic Confederacy, no German can be treated as an alien. Enclop. Amer. Alien, 175. In Naples, naturalization is conferred for services after one year, and in other cases, after a residence varying, according to circumstances, from five to ten years. Martens, Récueil des Traités Sup. tom. ix. p. 174.

In the Austrian dominions the stranger acquires rights of citizenship by being employed as a public functionary. The superior administrative authorities have the power of conferring these rights upon an individual, who has been previously authorized, after ten years residence within the empire, to exercise a profession. Mere admission into the military service does not bring with it naturalization. The wife of an Austrian citizen acquires citizenship by her marriage.

In Prussia, the stranger acquires the right of citizenship by his nomination to a public office; and by a recent law (1842) the superior administrative authorities are empowered to naturalize, with certain exceptions, any stranger who satisfies them as to his good conduct and means of existence. The wife of a Prussian citizen, also, acquires citizenship by her marriage.

In Bavaria, by the law of 1818, the *jura indigenatus* are acquired in three ways: 1. By the marriage of a foreign woman with a native. 2. By a domicile taken up by a stranger in the kingdom, who at the same time gives proof of his freedom from personal subjection to any foreign State. 3. By royal decree.

In the kingdom of the Netherlands, the power of conferring naturalization rests with the crown, by the 9th and 10th articles of the Fundamental Law of 1815.

In Russia, naturalization is acquired by taking an oath of allegiance to the Emperor; but naturalized strangers may, at any time, renounce their naturalization and return to their country. Phillimore on International Law, vol. i. p. 352.

Though England admits foreigners to the rights of British subjects, she does not allow of the expatriation of her native subjects; nor does she require, on naturalization, a renunciation by aliens of their allegiance to their former government. But whatever the embarrassment of a double allegiance to the individual, that does not affect, as has been elsewhere explained, the validity of the naturalization, with reference to the adopted country.

The naturalization law of the United States proceeds on the principle, that every individual has a right to change his allegiance, and such has been the language of our diplomatic communications, in accordance with the doctrine of the publicists, that whenever a child attains his majority, according to the law of his domicile of origin, he becomes free to choose his nationality; but the Supreme Court, while recognizing, in common with the Admiralty tribunals of England, a change of domicile for commercial purposes, have not admitted the distinct right of expatriation, independently of an act of Congress to authorize it. On this point, Chancellor Kent remarks: "From an historical review of the principal discussions in the Federal Courts, the better opinion would seem to be, that a citizen cannot renounce his allegiance to the United States, without the permission of government, to be declared by law; and that as there is no existing legislative regulation on the case, the rule of the English common law remains unaltered." He adds: "The naturalization laws of the United States are, however, inconsistent with this general doctrine; for they require the alien who is to be naturalized to abjure his former allegiance, without requiring any evidence that his native sovereign has released it." Kent's Comm. vol. ii. p. 49.

The French code prescribes, liv, i. t. i. c. 2, § 17, that the quality of Frenchmen is lost: 1st. By naturalization in a foreign country. 2d. By the acceptance of office from a foreign government, without the permission of the State. And 3d. By fixing his residence abroad without the intention of returning. By the 18th section, however, it is provided that it may be at any time recovered, on due application to the government, on a Frenchman's returning to France, and renouncing the foreign functions, and his child may also obtain the right, by complying with the terms prescribed in other cases.

In Austria, emigration is not permitted without the consent of the proper authorities; but the emigrant who has obtained permission, and who quits the empire, *sine animo revertendi* forfeits the privileges of an Austrian citizen. A case of emigration by consent was that of the Lombards, who, in consequence of political events, obtained permission to leave the Austrian territories, in order to become naturalized in Sardinia, and the subsequent confiscation of whose property in Lombardy, in 1853, was made a subject of interposition by the government of Great Britain with that of Austria. The decree of the Emperor of Austria, of 1832, as to unlawful emigrants, who lose all their civil and political rights at home, and which was the case of the Hungarians, who escaped after the events of 1848–9, is noticed in Mr. Marcy's note to Mr. Hulsemann, respecting Koszta, heretofore cited. The same rule applies in Prussia as in Austria with regard to emigration. In Bavaria, citizenship is lost: — 1st. By the acquisition, without the special permission of the king, of the *jus indigenatus*, in another country. 2d. By emigration. 3d. By the marriage of a Bavarian woman with a foreigner.

In Wurtemburg, citizenship is lost by emigration, authorized by the government, or by the acceptance of a public office in another State. Phillimore on International Law, *ut supra*.

In Russia, the quality of a subject is lost by a residence abroad; by voluntary expatriation, without the intention of return; by disappearance. Every individual subject to the capitation tax is considered to have disappeared who, during ten years, has not been heard of in the place of his domicile. Rev. Etr. et Fr. tom. iii. p. 267.]

APPENDIX, NO. II.

AN ACT TO REMODEL THE DIPLOMATIC AND CONSULAR SYSTEMS OF THE UNITED STATES.[1]

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That from and after the thirtieth day of June next,[2] the President of the United States shall, by and with the advice and consent of the Senate, appoint representatives of the grade of Envoys Extraordinary and Ministers Plenipotentiary to the following countries, who shall receive an annual compensation for their services not exceeding the amount specified herein for each:

Great Britain, seventeen thousand five hundred dollars; France, fifteen thousand dollars; Spain, twelve thousand dollars; Russia, twelve thousand dollars; Austria, twelve thousand dollars; Prussia, twelve thousand dollars; Switzerland, seven thousand five hundred dollars; Rome, seven thousand five hundred dollars; Naples, seven thousand five hundred dollars; Sardinia, seven thousand five hundred dollars; Belgium, seven thousand five hundred dollars; Holland, seven thousand five hundred dollars; Portugal, seven thousand five hundred dollars; Denmark, seven thousand five hundred dollars; Sweden, seven thousand five hundred dollars; Turkey, nine thousand dollars; China, fifteen thousand dollars; Brazil, twelve thousand dollars; Peru, ten thousand dollars; Chili, nine thousand dollars; Argentine Republic, seven thousand five hundred dollars; New Granada, seven thousand five hundred dollars; Bolivia, seven thousand five hundred dollars; Ecuador, seven thousand five hundred dollars; Venezuela, seven thousand five hundred dollars; Guatemala, seven thousand five hundred dollars; Nicaragua, seven thousand five hundred dollars; Mexico, twelve thousand dollars.

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[1] See Part III. ch. 1, § 6, p. 277. Introductory Remarks, p. clviii.

[2] By the third section of the Civil and Diplomatic Appropriation Act, passed March 3, 1855, it was enacted, that the salaries to which Envoys Extraordinary and Ministers Plenipotentiary shall be entitled, on the 1st July, 1855, may be allowed to such as may be in office on that day, without reappointment, nor shall such Envoys Extraordinary and Ministers Plenipotentiary be required to take with them Secretaries of Legation, unless they should be allowed by the President of the United States.

Sec. 2. *And be it further enacted*, That from and after the thirtieth day of June next, the President of the United States shall, by and with the advice and consent of the Senate, appoint Secretaries of Legation to the following countries, who shall receive an annual compensation for their services not exceeding the amount specified herein for each:

Great Britain, twenty-five hundred dollars; France, twenty-two hundred and fifty dollars; Spain, twenty-two hundred and fifty dollars; Russia, two thousand dollars; Austria, two thousand dollars; Prussia, two thousand dollars; Switzerland, fifteen hundred dollars; Rome, fifteen hundred dollars; Naples, fifteen hundred dollars; Sardinia, fifteen hundred dollars; Belgium, fifteen hundred dollars; Holland, fifteen hundred dollars; Portugal, fifteen hundred dollars; Denmark, fifteen hundred dollars; Sweden, fifteen hundred dollars; Brazil, two thousand dollars; Peru, two thousand dollars; Chili, fifteen hundred dollars; Argentine Republic, fifteen hundred dollars; New Granada, fifteen hundred dollars; Bolivia, fifteen hundred dollars; Ecuador, fifteen hundred dollars; Venezuela, fifteen hundred dollars; Guatemala, fifteen hundred dollars; Nicaragua, fifteen hundred dollars; Mexico, two thousand dollars.

Sec. 3. *And be it further enacted*, That from and after the thirtieth day of June next, the President of the United States shall, by and with the advice and consent of the Senate, appoint a Commissioner to the Sandwich Islands, who shall receive an annual compensation for his services of six thousand dollars; an Interpreter to the mission to China, who shall receive for his services two thousand five hundred dollars per annum; and a Dragoman to the mission to Turkey, who shall receive for his services twenty-five hundred dollars per annum.

Sec. 4. *And be it further enacted*, That from and after the thirtieth day of June next, the President of the United States shall, by and with the advice and consent of the Senate, appoint Consuls for the United States, to reside at the following places, who shall receive, during their continuance in office, an annual compensation for their services, not exceeding the amount specified herein for each, and who shall not be permitted to transact, under the penalty of being recalled and fined in a sum not less than two thousand dollars, business either in their own name or through the agency of others:

Great Britain. — London, seven thousand five hundred dollars; Liverpool, seven thousand five hundred dollars; Glasgow, four thousand dollars; Dundee, two thousand dollars; Newcastle, fifteen hundred dollars; Leeds, fifteen hundred dollars; Belfast, two thousand dollars; Hong-Kong, three thousand dollars; Calcutta, three thousand five hundred dollars; Halifax, two thousand dollars; Melbourne, four thousand dollars; Nassau, two thousand dollars; Kingston, (Jamaica,) two thousand dollars.

Holland. — Rotterdam, two thousand dollars; Amsterdam, one thousand dollars.

Prussia. — Aix-la-Chapelle, twenty-five hundred dollars.

France. — Paris, five thousand dollars; Havre, five thousand dollars; Marseilles, two thousand five hundred dollars; Bordeaux, two thousand dollars; Lyons, one thousand dollars; La Rochelle, one thousand dollars; Nantes, one thousand dollars.

Spain. — Cadiz, fifteen hundred dollars; Malaga, fifteen hundred dollars; St. Jago de Cuba, two thousand dollars; Matanzas, three thousand dollars; St. Johns,

(P. R.) two thousand dollars; Trinidad de Cuba, three thousand dollars; Ponce, (P. R.) fifteen hundred dollars; Havana, six thousand dollars.

Portugal. — Lisbon, fifteen hundred dollars; Funchal, fifteen hundred dollars.

Belgium. — Antwerp, two thousand five hundred dollars.

Russia. — St. Petersburg, two thousand five hundred dollars.

Denmark. — St. Thomas, four thousand dollars; Elsineur, fifteen hundred dollars.

Austria. — Trieste, two thousand dollars; Vienna, one thousand dollars.

Saxony. — Leipsic, fifteen hundred dollars.

Bavaria. — Munich, one thousand dollars.

Hanseatic and Free Cities. — Bremen, two thousand dollars; Hamburgh, two thousand dollars.

Frankfort-on-the-Maine — Including the Grand Duchy of Hesse-Darmstadt, the Electorate of Hesse-Cassel, the Duchy of Nassau, and the Landgraviate of Hesse-Hombourg, two thousand dollars.

Wurtemburg. — Stuttgardt, one thousand dollars.

Baden. — Carlsrue, one thousand dollars.

Switzerland. — Basle, fifteen hundred dollars; Zurich, fifteen hundred dollars; Geneva, fifteen hundred dollars.

Sardinia. — Genoa, one thousand five hundred dollars.

Tuscany. — Leghorn, fifteen hundred dollars.

Kingdom of the Two Sicilies. — Naples, fifteen hundred dollars; Palermo, fifteen hundred dollars; Messina, one thousand dollars.

Turkish Dominions. — Constantinople, two thousand five hundred dollars; Smyrna, two thousand dollars; Beirut, two thousand dollars; Jerusalem, one thousand dollars; Alexandria, three thousand five hundred dollars.

Barbary States. — Tangiers, two thousand five hundred dollars; Tripoli, two thousand five hundred dollars; Tunis, two thousand five hundred dollars.

China. — Canton, three thousand dollars; Shanghai, three thousand dollars; Amoy, twenty-five hundred dollars; Fouchow, two thousand five hundred dollars; Ningpo, two thousand five hundred dollars.

Japan. — Simoda,[1] dollars; Hakodadi, dollars.

Borneo. — Bruni, dollars.

Sandwich Islands. — Honolulu, four thousand dollars.

Hayti. — Port-au-Prince, two thousand dollars; City of St. Domingo, fifteen hundred dollars.

Mexico. — Vera Cruz, three thousand five hundred dollars; Acapulco, two thousand dollars.

Central America. — San Juan del Norte, two thousand dollars; San Juan del Sur, two thousand dollars.

New Granada. — Panama, three thousand five hundred dollars; Aspinwall, two thousand five hundred dollars.

Venezuela. — Laguayra, fifteen hundred dollars.

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[1] An appropriation has been made for the salary, at the rate of five thousand dollars per annum, of a Consul-General to Japan, to reside at Simoda.

Brazil. — Rio de Janeiro, six thousand dollars; Pernambuco, two thousand dollars.

Argentine Republic. — Buenos Ayres, two thousand dollars.

Peru. — Callao, three thousand five hundred dollars.

Chili. — Valparaiso, three thousand dollars.

Sec. 5. *And be it further enacted*, That from and after the thirtieth day of June next, the President of the United States shall, by and with the advice and consent of the Senate, appoint Consuls and Commercial Agents for the United States to reside at the following places, who shall receive, during their continuance in office, an annual compensation for their services not exceeding the amount specified herein for each, and who shall be at liberty to transact business:

Great Britain. — Southampton, one thousand dollars; Bristol, one thousand dollars; Leith, one thousand dollars; Dublin, one thousand dollars; Cork, one thousand dollars; Galway, one thousand dollars; Bombay, one thousand dollars; Singapore, one thousand dollars; Gibraltar, seven hundred and fifty dollars; Island of Malta, one thousand dollars; Cape Town, one thousand dollars; Port Louis, one thousand dollars; St. John's, (N. B.) one thousand dollars; Pictou, one thousand dollars; Demarara, one thousand dollars; Sidney, one thousand dollars; Falkland Islands, one thousand dollars; Hobart Town, one thousand dollars; Bermuda, one thousand dollars; Turk's Island, one thousand dollars; Barbadoes, one thousand dollars; Island of Trinidad, one thousand dollars; St. Helena, one thousand dollars; St. Christopher, one thousand dollars; Antigua, one thousand dollars; Ceylon, one thousand dollars.

Russia. — Odessa, fifteen hundred dollars; Galatza, one thousand dollars.

France. — Martinique, seven hundred and fifty dollars; Miquelon, seven hundred and fifty dollars.

Spain. — Barcelona, seven hundred and fifty dollars; Manilla, seven hundred and fifty dollars.

Portugal. — Macao, one thousand dollars; Mozambique, seven hundred and fifty dollars; Fayal, seven hundred and fifty dollars; St. Jago Cape Verd, seven hundred and fifty dollars.

Hanover and Brunswick. — Hanover, five hundred dollars.

Mecklenburg-Schwerin and Mecklenburg-Strelitz. — Schwerin, five hundred dollars.

Oldenburg. — Oldenburg, five hundred dollars.

Danish Dominions. — Santa Cruz, seven hundred and fifty dollars.

Sweden and Norway. — Gothenburg, seven hundred and fifty dollars.

Austria. — Venice, seven hundred and fifty dollars.

Sardinia. — Spezzia, seven hundred and fifty dollars.

Greece. — Athens, one thousand dollars.

Turkey. — Candia, one thousand dollars; Cyprus, one thousand dollars.

Ionian Islands. — Zante, one thousand dollars.

Africa. — Monrovia, one thousand dollars; Zanzibar, one thousand dollars.

New Zealand. — Bay Islands, one thousand dollars.

Hayti. — Cape Haytien, one thousand dollars; Aux Cayes, five hundred dollars.

Mexico. — Mexico, one thousand dollars; Paso del Norte, five hundred dollars; Tampico, one thousand dollars; Matamoras, one thousand dollars; Tabasco, five

hundred dollars; Mazatlan, five hundred dollars; Tehuantepec, one thousand dollars; Manatitlan, one thousand dollars.

Central America. — Omoa and Truxillo, one thousand dollars; San Jose, five hundred dollars.

New Granada. — Cartagena, five hundred dollars; Sabanillo, five hundred dollars.

Venezuela. — Ciudad Bolivar, seven hundred and fifty dollars; Puerto Cabello, seven hundred and fifty dollars; Maracaibo, seven hundred and fifty dollars.

Ecuador. — Guayaquil, seven hundred and fifty dollars.

Brazil. — Maranham Island, seven hundred and fifty dollars; Rio Grande, one thousand dollars; Bahia, one thousand dollars; Para, one thousand dollars.

Uruguay. — Montevideo, one thousand dollars.

Chili. — Talcahuano, one thousand dollars.

Peru. — Paita, five hundred dollars; Tumbez, five hundred dollars.

Sandwich Islands. — Lahaina, one thousand dollars; Hilo, one thousand dollars.

Navigator's Islands. — Apia, one thousand dollars.

Society Islands. — Tahiti, one thousand dollars.

Feejee Islands. — Lanthala, one thousand dollars.

Holland. — Batavia, one thousand dollars, (Commercial Agent); Paramaribo, five hundred dollars, (Commercial Agent); Padang, five hundred dollars, (Commercial Agent); St. Martin, five hundred dollars, (Commercial Agent); Curaeoa, five hundred dollars, (Commercial Agent.)

Sec. 6. *And be it further enacted*, That no Envoy Extraordinary and Minister Plenipotentiary, Commissioner, Secretary of Legation, Dragoman, Interpreter, Consul, or Commercial Agent, who shall, after the thirtieth day of June next, be appointed to any of the countries or places herein named, be entitled to compensation until he shall have reached his post and entered upon his official duties.

Sec. 7. *And be it further enacted*, That the compensation of every Envoy Extraordinary and Minister Plenipotentiary, Commissioner, Secretary of Legation, Dragoman, Interpreter, Consul, and Commercial Agent, who shall, after the thirtieth day of June next, be appointed to any of the countries or places herein named, shall cease on the day that his successor shall enter upon the duties of his office.

Sec. 8. *And be it further enacted*, That no Envoy Extraordinary and Minister Plenipotentiary, Commissioner, Secretary of Legation, Dragoman, Interpreter, Consul, or Commercial Agent, shall absent himself from the country to which he is accredited, or from his consular district, for a longer period than ten days, without having previously obtained leave from the President of the United States, and that during his absence for any period longer than that time, either with or without leave, his salary shall not be allowed him.

Sec. 9. *And be it further enacted*, That the President shall appoint no other than citizens of the United States, who are residents thereof, or who shall be abroad in the employment of the government at the time of their appointment, as Envoys Extraordinary and Ministers Plenipotentiary, Commissioners, Secretaries of Legation, Dragomans, Interpreters, Consuls, or Commercial Agents, nor shall other than citizens of the United States be employed either as Vice-Consul,

Consular Agents, or as clerks in the offices of either, and have access to the archives therein deposited.

Sec. 10. *And be it further enacted*, That Envoys Extraordinary and Ministers Plenipotentiary, and Consuls, shall be required to locate their legations and consulates, in the places in which they are established, in as central a position as can be conveniently procured, and keep them open daily from ten o'clock in the morning until four o'clock in the afternoon; Sundays, other holidays, and anniversaries excepted.

Sec. 11. *And be it further enacted*, That as soon as a Consul or Commercial Agent shall be officially notified of his appointment, he shall execute a bond with two sureties, in a sum of not less than one thousand nor more than ten thousand dollars, for the faithful discharge of every duty relating to his office; which bond shall be satisfactory to the United States District Attorney for the district in which the appointed Consul resides, and be transmitted to the Secretary of State for his approval. If the Consul is not in the United States at the time he is commissioned, as soon as he is apprised of the fact he shall sign, and transmit by the most expeditious conveyance, a bond like the aforesaid, which shall afterwards be undersigned by two sureties who are permanent residents of the United States, and approved by the State Department. Where there is a United States legation in a country to which a Consul shall be appointed, application shall be made through it to the government for an exequatur; but, where there is none, the application shall be made direct to the proper department.

Sec. 12. *And be it further enacted*, That it shall be the duty of Consuls and Commercial Agents to charge the following fees for performing the services specified, for which, under the penalty of being removed from office, they shall account to the government at the expiration of every three months, and hold the proceeds subject to its drafts:

For receiving and delivering ship's papers, half cent on every ton, registered measurement, of the vessel for which the service is performed.

For every seaman, who may be discharged or shipped at the consulate or commercial agency, or in the port in which they are located, one dollar; which shall be paid by the master of the vessel.

For every other certificate, except passports — the signing and verification of which shall be free — two dollars.

Sec. 13. *And be it further enacted*, That in capitals where a legation of the United States is established, Consuls and Commercial Agents shall only be permitted to grant and verify passports in the absence of the United States diplomatic representative.

Sec. 14. *And be it further enacted*, That no commission shall in future be charged by Consuls or Commercial Agents, for receiving or disbursing the wages or extra wages to which seamen may be entitled, who are discharged by the masters of vessels in foreign countries, or for moneys advanced to such as may be in distress, seeking relief from the consulate or commercial agency: nor shall any Consul or Commercial Agent be directly or indirectly interested in any profits derived from clothing, boarding, or sending home such seamen.

Sec. 15. *And be it further enacted*, That no Consul or Commercial Agent of the United States shall discharge any mariner, being a citizen of the United States, in a foreign port, without requiring the payment of the two months' wages to

which said mariner is entitled under the provisions of the Act of February twenty eight, eighteen hundred and three, unless, upon due investigation into the circumstances under which the master and mariner have jointly applied for such discharge, and on a private examination of such mariner by the Consul or Commercial Agent, separate and apart from all officers of the vessel, the Consul or Commercial Agent shall be satisfied that it is for the interest and welfare of such mariner to be so discharged; nor shall any Consul or Commercial Agent discharge any mariner as aforesaid, without requiring the full amount of three months' wages, as provided by the above-named act, unless under such circumstances as will, in his judgment, secure the United States from all liability to expense, on account of such mariner: *Provided*, That in the cases of stranded vessels, or vessels condemned as unfit for service, no payment of extra wages shall be required; and where any mariner, after his discharge, shall have incurred expense at the port of discharge, before shipping again, such expense shall be paid out of the two months' wages aforesaid, and the balance only delivered to him.

Sec. 16. *And be it further enacted*, That every Consul and Commercial Agent of the United States shall keep a detailed list of all mariners discharged by them respectively, specifying their names and the names of the vessels from which they were discharged, and the payments, if any, afterwards made on account of each, and shall make official returns of said lists half-yearly to the Treasury Department.

Sec. 17. *And be it further enacted*, That every Consul and Commercial Agent of the United States shall make an official entry of every discharge which they may grant, respectively, on the list of the crew and shipping articles of the vessel from which such discharge shall be made, specifying the payment, if any, which has been required in each case; and if they shall have remitted the payment of the two months' wages to which the mariner is entitled, they shall also certify on said shipping list and articles that they have allowed the remission, upon the joint application of the master and mariner therefor, after a separate examination of the mariner, after a due investigation of all the circumstances, and after being satisfied that the discharge so allowed, without said payment, is for the interest and welfare of the mariner; and if they shall have remitted the payment of the one month's wages, to which the United States is entitled, they shall certify that they have allowed the remission after a due investigation of all the circumstances, and after being satisfied that they are such as will, in their judgment, secure the United States from all liability to expense on account of such mariner; and a copy of all such entries and certificates shall be annually transmitted to the Treasury Department, by the proper officers of the customs in the several ports of the United States.

Sec. 18. *And be it further enacted*, That if any Consul or Commercial Agent of the United States, upon discharging a mariner without requiring the payment of the one month's wages to which the United States is entitled, shall neglect to certify, in the manner required in such case by the preceding section of this act, he shall be accountable to the Treasury Department for the sum so remitted. And in any action brought by a mariner to recover the extra wages to which he is entitled under the Act of February twenty-eight, eighteen hundred and three, the defence, that the payment of such wages was duly remitted, shall not be sustained without the production of the certificate in such case required by this act,

or, when its non-production is accounted for, by the production of a certified copy thereof, and the truth of the facts certified to, and the propriety of the remission, shall be still open to investigation.

Sec. 19. *And be it further enacted*, That if, upon the application of any mariner, it shall appear to the Consul or Commercial Agent that he is entitled to his discharge under any act of Congress, or according to the general principles of the maritime law, as recognized in the United States, he shall discharge such mariner, and shall require of the master the payment of three months' wages, as provided in the Act of February twenty-eight, eighteen hundred and three, and shall not remit the same, or any part thereof, except in the cases mentioned in the proviso of the ninth clause of the first section of the Act of July twentieth, eighteen hundred and forty, to the following effect: — "If the Consul or other Commercial Agent shall be satisfied the contract has expired, or the voyage been protracted by circumstances beyond the control of the master, and without any design on his part to violate the articles of shipment, then he may, if he deems it just, discharge the mariner without exacting the three months' additional pay.

Sec. 20. *And be it further enacted*, That every Consul and Commercial Agent, for any neglect to perform the duties enjoined upon him by this act, shall be liable to any injured person for all damages occasioned thereby; and, for any violation of the provisions of the fifteenth and nineteenth sections of this act, shall also be liable to indictment, and to a penalty, in the manner provided by the eighteenth clause of the first section of the Act of July twentieth, eighteen hundred and forty.

Sec. 21. *And be it further enacted*, That the Act of April fourteenth, seventeen hundred and ninety-two, concerning Consuls, &c., is hereby so amended, that if any American citizen dying abroad shall, by will or any other writing, leave special directions for the management and settlement, by the Consul, of the personal or other property which he may die possessed of in the country where he may die, it shall be the duty of the Consul, where the laws of the country permit, strictly to observe the directions so given by the deceased. Or, if such citizen so dying shall, by will or any other writing, have appointed any other person than the Consul to take charge of and settle his affairs, in that case it shall be the duty of the Consul, when and so often as required by the so-appointed agent or trustee of the deceased, to give his official aid in whatever way may be necessary to facilitate the operations of such trustee or agent, and, where the laws of the country permit, to protect the property of the deceased from any interference of the local authorities of the country in which he may have died; and, to this end, it shall also be the duty of the Consul to place his official seal on all or any portions of the property of the deceased, as may be required by the said agent or trustee, and to break and remove the same seal when required by the agent or trustee, and not otherwise; he, the said Consul or Commercial Agent, receiving therefor two dollars for each seal, which, like all other fees for consular service, including all charges for extension of protest, as also such commissions as are allowed by existing laws on settlement of estates of American citizens by Consuls and Commercial Agents, shall be reported to the Treasury Department, and held subject to its order.

Sec. 22. *And be it further enacted*, That the following record-books shall be provided for and kept in each consulate and commercial agency: A letter-book,

into which shall be copied, in the English language, all official letters and notes in the order of their dates, which are written by the Consul or Commercial Agent; a book for the entry of protests, and in which all other official consular acts likewise shall be recorded; and, at seaports, a book wherein shall be recorded the list of the crew, and the age, tonnage, owner or owners, name and place to which she belongs, of every American vessel which arrives. Consuls and Commercial Agents shall make quarterly returns to their government, specifying the amount of fees received, the number of vessels, and the amount of their tonnage, which have arrived and departed; the number of seamen, and what portion of them are protected; and, as nearly as possible, the nature and value of their cargoes, and where produced.

Sec. 23. *And be it further enacted*, That as soon as a Consul or Commercial Agent shall have received his exequatur, or been provisionally recognized, he shall apply to his predecessor for the archives of the consulate or commercial agency, and make an inventory of the papers, and such other articles as they may contain, for which he shall pass a receipt and transmit a copy thereof to the State Department.

Sec. 24. *And be it further enacted*, That the Secretary of State be, and he is hereby, authorized to prescribe such additional regulations for the keeping of the consular books and records, and insuring proper returns, as the public interest may require.

Sec. 25. *And be it further enacted*, That the President of the United States be, and he is hereby, authorized to bestow the title of Consul-General upon any United States Consul in Asia or Africa, when in his opinion such title will promote the public interest.

Sec. 26. *And be it further enacted*, That all acts and parts of acts authorizing attachés to any of our legations, or the payment to Ministers and Consuls of the United States of outfits or infits, or salaries for clerk hire and office rent, be, and the same are hereby, repealed.

Sec. 27. *And be it further enacted*, The provisions of this act to take effect from and after the thirtieth of June next; any law or laws of the United States to the contrary notwithstanding.

Approved, *March* 1, 1855.

APPENDIX, NO. III.

DEBATE ON NEUTRAL RIGHTS.[1]

House of Commons, July 4, 1854.

Mr. J. Phillimore rose to move, pursuant to notice, the following resolution: "That it is the opinion of this house, that, however, from the peculiar circumstances of this war, a relaxation of the principle, that the goods of an enemy in the ship of a friend are lawful prize, may be justifiable, to renounce or surrender a right so clearly incorporated with the law of nations, so firmly maintained by us in times of the greatest peril and distress, and so interwoven with our maritime renown, would be inconsistent with the security and honor of the country." He thought that Parliament ought not to be silent, when so great a change was made in the law and practice on this subject. The general opinion was, that the policy, now for the first time adopted by her Majesty's government, would, if it were generally followed, diminish the miseries of war; but he held a different opinion. Two great principles had always been laid down on this subject: first, that the goods of an enemy on board the ship of a friend were lawful prize; and, secondly, that the goods of a friend on board the ships of an enemy ought to be restored. Those principles ran through the law of England; they had been laid down by the Consolato del Mare, confirmed by Grotius, and ratified by his approbation. Vattel, Bynkershoek, and other writers on international law, had followed in the same track; the same principle had been established by the old law of France, which was extremely severe on this subject. There had been several private treaties by which this rule had been regulated, and in such a way as to expose the interests of this country to no danger whatever. We had made stipulations with France, with which country we had generally made war by sea; and with Holland, with which we had generally been at peace; so that with neither of those countries were we likely to be compromised by acting upon this principle. It was at the time when this country was laboring under the pressure of the American war, and also engaged with the three great maritime powers of Europe — France, Spain, and Holland — that the Empress of Russia put forth her pretensions on the subject of neutral ships making free goods; but although this country was then in great difficulties, we refused to give way to those pretensions; and subsequently to that period, treaties had been frequently made which

[1] See Part IV. ch. 3, § 23, p. 541, note. Also Introductory Remarks, p. clii.

most fully recognized the provisions on this subject which then Russia disputed. In 1793 Russia herself entered into a convention with Great Britain, in which she engaged to controvert the principle that free ships made free goods; so did Spain, so did Portugal, and afterwards Sweden and Denmark. In 1794 America, by a treaty, recognized the same principle; therefore, he thought, that he had pretty well established his proposition, that, so far as the great maritime powers were concerned and the greatest authorities went, there could be no dispute upon the subject; and he defied any person conversant with the works of the chief writers on the law of nations upon that subject to controvert that principle, or to say that it had not formed the basis of international law. But there was another authority still more important, and that was the authority of the American government. Jefferson wrote upon this subject:—"I believe it cannot be doubted that, by the general law of nations, the goods of a friend found in the vessel of an enemy are free, and the goods of an enemy found in the vessel of a friend are lawful prize." That was the opinion of a man not particularly noted for his partiality to this country; and in answer to a remonstrance, in 1793, "It is true," said he, "that sundry nations have introduced by treaty another principle, but that is the effect of a particular or special treaty, and not the general principle of the law of nations." In the proceedings of Congress, in 1795, he observed that a source of complaint had been, that the English took goods in neutral vessels, which, it was said, was against the law of nations, and ought to be prevented by them, (the Americans): but, on the contrary, they considered it to be an old established principle in the law of nations, that the goods of a friend, if found in the enemy's vessels, were free, and an enemy's goods in the vessels of a friend, were lawful prize. That was also the opinion of the secretary, Mr. Pickering, and also of Chancellor Kent, who had said that neutral ships did not afford protection to the enemy's property, which might be seized if found on board such a vessel beyond the limits of neutral jurisdiction. Indeed it was formerly a question whether a neutral vessel itself, conveying an enemy's property, was not liable to confiscation; but that principle had been abandoned in 1793, by the naval powers of Europe, and was not sanctioned by the existing law of nations. During the whole of the series of wars which grew out of the French Revolution, the government of the United States admitted the English rule to be a valid one, and that it was the true doctrine of the international law, that an enemy's property was liable to be seized if found on board neutral ships. The same principle was also distinctly laid down by Professor Wheaton, who said they ought not to restore an enemy's property seized in neutral vessels. The answers made by secretaries Pickering and Jefferson were to the effect, that there could not be any doubt with regard to the authority, or much question as to the right of America to insist on this principle. Chancellor Kent had said, there was a marked difference in the principles upon which war was carried on by land and by sea. The object of maritime war was the destruction of the enemy's commerce and of his naval power, and the capture and destruction of private property was essential to that end, and was allowed by the law of nations. But the reason why a different principle was to be observed in continental wars, carried on by land, was not so clear. Was it true that the same principle did not prevail in continental wars? Was it true that they were carried on with a strictness and regularity, as respected private property, which formed a marked contrast to war carried on by naval means? He (Mr. Phillimore) must say that a careful perusal of history had

not led him to form any such conclusion. Was not the earliest thing they read of, in reference to this subject, the axiom that wars should always be made to support themselves? Gustavus Adolphus was reputed a humane and enlightened warrior, but he acted upon that principle; so did Marshal Turenne, Frederick the Great himself, and the most renowned French general, within the last century, whose instructions were to occupy portions of territory without respect to private right; and they found such expressions in those instructions as "The Prince of Waldeck is indisposed, you must seize all you can in his territory." That was the principle of the great Napoleon; and did not our own history show that we had acted upon much the same principle? Let them look at the storming of towns and the sacking of cities, described in the history of the Peninsular war. It was, therefore, not true that there was so much more regularity and superiority in carrying on continental, as compared with maritime wars, but the case was exactly the other way. The only difference was, that in carrying on continental wars injury to private property was often necessary; whereas in maritime wars it was absolutely essential, as a means of weakening the enemy's power. He thought, therefore, the reason of such a proceeding was plain, and that there could not be any kind of doubt whatever of the authority. But dismissing the question of authority altogether, he would argue it on reason alone, for it was upon that the whole argument turned. He took it for granted that every one desired a principle should prevail which would render war less probable; but the contrary would be the case, if the principle that free ships made free goods prevailed, for it tended to increase the probability of war, by making it the harvest of neutral nations, and every neutral nation would desire to involve its neighbors in hostilities, that it might gain advantages from which, at other times, it was necessarily excluded. It gave every neutral nation a direct interest in the hostilities of foreign States. On what principle, he asked, did they prohibit neutrals from carrying contraband of war? On what principle did they confiscate a ship that carried despatches to the enemy? On what principle did they prohibit a ship from sailing into a blockaded port? Why upon this — that they would not allow a belligerent to do, by means of a neutral, that which it could not do by itself; whereas, by the adoption of the principle that free ships made free goods, they would, instead of locking up their enemy's produce, and, in consequence of the failure of his resources, increasing his desire for peace, allow it to be carried all over the globe, and thus destroy the effect of their own efforts. Surely, if it was desirable that the blood and treasure expended in war should produce any effect, it was desirable that the blood they shed and the treasure they expended should produce the greatest possible return; and the consequence of not allowing it to do so must be, that they would have to shed more blood and treasure to accomplish the objects for which war was originally commenced. The object of war, while it lasted, was to do as much injury as they could to their enemy, and to deprive him of the advantages of peace. If they allowed him to enjoy those advantages, of what use was it to expend the blood of their soldiers and the taxes wrung from the hard labor of the people? (Hear.) His motives for desiring peace would vanish, just in proportion as he enjoyed the advantages of peace in the time of war. It was absurd that, during a time when they were taxing the revenue of the country and the resources of the people, and inducing them to enlarge those resources as much as possible, with a view to inflicting

chastisement upon the enemy, they should enable that enemy, by means of neutral ships, to preserve his commerce, and enjoy those advantages which it would otherwise be impossible for him to obtain. He could perfectly understand the arguments of those who, like his honorable friends the members for Manchester and the West Riding, upheld upon benevolent, though he thought very mistaken principles, that war ought to be abandoned, or, rather ought never to be undertaken; but if the principle was to be adopted, that, being at war, they ought not to do the enemy all the mischief they could, and, while carrying on war, to allow him, in a great measure, to enjoy the advantages of peace, that the blood they shed and the money they spent was not to inflict injury on the subjects of the power with which they were at war, they had better recall their ships, disband their armies, and lower their flag; but if they thought otherwise, they should certainly not do that which would have a tendency to neutralize the exertions they were disposed to make. For those reasons he trusted that the house would adopt the resolution of which he had given notice. He had stated his proofs, and given the authorities who appeared to him to be necessary; and he believed, with the exception of some modern writers, and a few who wrote with a particular purpose, they were unanimous in their opinions, and gave the strongest reasons showing that it was a mistaken humanity to suppose that a nation could carry on a maritime war, and at the same time allow their enemy the advantages of peace. He thought he should be justified in that opinion by the authority of every statesman that this country had produced up to the present time; and he hoped we should not surrender that bulwark which we had hitherto preserved impregnable, or descend from that strong ground which our ancestors had thought their blood and treasure had been well employed in obtaining for us; and he would admit no principle, the effect of which would be to diminish our strength, or make us less able to resist either the open or disguised attacks of any earthly despot. (Loud cheers.)

Mr. MITCHELL seconded the resolution; but, in doing so, observed that he did not altogether concur in the first part, which was to the effect, that, from the peculiar circumstances of the present war, any relaxation of the principle was justifiable. He had a very strong opinion upon the course which had been pursued during the progess of the present war, but had hitherto had no opportunity of expressing it, or of hearing a discussion upon the important principles involved in it. There was no member of the house who had followed the course of trade consequent on the changes in the system of management during the war, more closely and carefully than himself, having been deeply interested all his life in trade. He believed that no relaxation of the principle relating to the trade of Russia, while we were engaged in war with that country, would be at all conducive to the advantage of the trade of this country; and there was, probably, not a man well acquainted with Russia but would admit, that no surer means could be employed to humble her than the destruction of her trade. That country exported produce annually to the amount of from £12,000,000 to £15,000,000, a large portion of which went directly, in the shape of revenue, to the great Russian landholders. If, therefore, they destroyed that outlet for their produce, there could be no question that it would be tantamount to depriving the only class which had any influence upon the government of the country, except the emperor himself, of their revenue: and the only way of proceeding effectually was to

stop the trade of the country, which they could not well do if they allowed the relaxations which had been the subject of discussion. He believed that somewhere about December, when it was pretty certain that war would take place between this country and Russia, two of the most eminent merchants in the Russian trade went to the noble lord the Secretary of State for Foreign Affairs, and stated to him that they were authorized by the trade to ask whether it would be safe to make the usual advances to Russia, and to enter into the usual trade engagements with subjects of that power. On which Lord Clarendon, with an almost entire absence of official reserve, told them it would be highly unsafe. The consequence was, that the value of Russian goods declined twenty per cent., and a great discouragement was given to the trade of Russia. A few houses, however, finding the most eminent of the merchants acting on the opinion of Lord Clarendon, had abstained from making purchases in Russia, bought considerable quantities of goods at the reduced price, and the moment war was proclaimed they went to the government, and said, "We bought these goods before war was declared, having no idea that it would take place;" and they therefore asked to be allowed to have those goods from Russia which they had bought at twenty per cent. below what they would otherwise have been worth, and numbers of the Russian vessels were allowed to leave their ports after the declaration of war. In like manner, it had been intimated that Archangel would be blockaded; but they were not told when it would take place, or when goods would be allowed to be removed from it. They had also had an intimation that the Black Sea would be blockaded; and the consequence was, that, owing to the relaxation in question, neutral vessels went there in shoals, obtaining the most enormous freights, and, owing to the unfair operations that were allowed, those who had no scruple about dealing with the enemies of the nation made profits, in many cases, of fifty per cent., to the manifest injury of the fair and loyal trader. (Hear, hear.) He thought it would be greatly for the advantage of British trade that they should know when it was to take place. There could be no doubt that, to a certain extent, they could not prevent a transit trade between Russia and Prussia; but the relaxations introduced had enormously extended that trade, by preventing the inspection of goods on board neutral vessels. Now, what had been the course adopted by the government? By a letter issued, he believed, by the Board of Trade, in reply to an inquiry from a merchant in the Russian trade, they learned that, according to the law of the country, any British merchant buying goods of a Russian, that country being at war with England, such goods would be considered the property of an enemy, and seized; but on the 15th of April an order was issued from the Treasury, which entirely abrogated that letter of the 11th, stating, that so long as such goods were not shipped from a Russian port, or in a Russian vessel, it was perfectly free for any one to obtain them, provided the port from which they were to be sent was not blockaded. In consequence of the intimation given on the 11th of April, the English merchants had determined to have nothing to do with the trade, and made their arrangements accordingly; yet on the 15th of April they were told they might engage in it. He had no hesitation in saying, that the manner in which British merchants had been treated by the government, in this matter, had been in the highest degree unjust to our traders and injurious to our trade. (Hear, hear.)

Sir W. Molesworth said — The motion of the learned gentleman raises two

questions; one a theoretical question of international law, the other a practical question of political expediency. The theoretical question is, whether the subjects of a neutral State ought to abstain from carrying in their ships the goods of belligerents; and, therefore, whether a belligerent State ought to have the right of confiscating the goods of an enemy in the ship of a neutral. The practical question is, (assuming that the subjects of a neutral State ought to abstain from carrying in their ships the goods of belligerents,) whether it would be politic and expedient for this country, in existing circumstances, to insist upon the belligerent right of confiscating Russian goods on board neutral ships, or whether it would be more politic and more expedient for this country to waive for the present that belligerent right? With regard to the practical question, the learned gentleman admits — to use the words of his motion — "that, from the peculiar circumstances of this war, a relaxation of the principle, that the goods of an enemy in the ship of a friend are lawful prize, may be justifiable." I will presently endeavor to prove that such a relaxation was both right and expedient. With regard to the theoretical question, the learned gentleman asks the house to declare, in the terms of his resolution, that to seize the goods of an enemy in the ship of a friend is a right so "clearly incorporated with the law of nations," that, to renounce or surrender it would be inconsistent with the security and honor of the country. Therefore, if the house were to agree to the resolution of the learned gentleman, the house would thereby pledge the honor of the country to uphold forever the position, that a belligerent State ought to have the right of confiscating enemy's goods on board a neutral ship. Now assuming for the present that there may be cases in which it may be wise for this house to limit its own freedom of action and that of its successors, by laying down abstract rules of international law, yet every one will admit that the house ought not to pledge the honor of the country to uphold for ever any position, about the truth of which there can be any reasonable doubt. (Hear, hear.) Consequently, to induce the house even to entertain his motion, the learned gentleman ought to have demonstrated that the position contained in his resolution is indisputably true. Has he done so? The learned gentleman has adduced many learned arguments, and quoted many learned authorities, in support of the rule of confiscating enemy's goods on board neutral ships. He has traced the origin of that rule to the dark ages that followed the downfall of the Roman empire; he has shown that, in more barbarous times, it was a rule of war on the Mediterranean, and that the first authority for it was the celebrated Consolato del Mare, which was probably written in the eleventh century. In support of the rule of the Consolato del Mare, the learned gentleman has referred to the great work of Grotius. With regard to the authority of Grotius on this subject, I must observe that Grotius deduced the rights of war chiefly from the custom and usage of ancient nations, from the sayings of ancient orators, and from the writings of the poets, historians, and philosophers of antiquity; but that since his days many of those rights of war have become obsolete, in consequence of the progress of humanity and civilization. (Hear, hear.) I must also observe that nothing can be more meagre than the chapter of the work of Grotius on the subject of the rights of neutrals — namely, the seventeenth of the third book — in which he treated, "*De his qui in bello medii sunt.*" The reason is obvious. Grotius wrote at a period when the rights of neutrals were little understood or cared for, because in those days war

was contagious; when two belligerents began to fight, the adjacent nations were eager to join in the fray, and few were willing, and still fewer were able, to stand aloof from the conflict. The work of Grotius contains only one distinct reference to the rule of confiscating enemy's goods on board neutral ships — namely, in a note to the fourth section of the first chapter of the third book, in which Grotius quotes the rule in question from the Consolato del Mare, without expressing either approval or disapproval of it. I doubt, therefore, whether the learned gentleman is entitled to claim Grotius as an authority for the principle, that the goods of an enemy in the ship of a friend are lawful prize. (Hear.) The learned gentleman has also quoted, in support of the rule of the Consolato del Mare, the authority of Vattel. Vattel was, without doubt, an elegant and popular writer, but, according to Chancellor Kent, very deficient in philosophical precision, and nothing can be more laconic than Vattel on the rule in question. He merely asserts it to be a rule of war, without assigning any reason in support of it. The learned gentleman has also mentioned the names of several legists learned in the law, who have declared the rule of the Consolato del Mare to be a rule of international law. But I must observe that learned legists are apt to assume that what is law ought always to be law; and, generally speaking, the more learned the legist, the less inclined is he to diminish the value of his learning by reforming the law. (Hear, hear, and laughter.) The honorable gentleman has scarcely alluded to the fact, that almost all the modern publicists of continental Europe — namely, Hübner, Klüber, De Martens, De Rayneval, Ortolan, Hautefeuille — have condemned the rule of the Consolato del Mare as a relic of barbarism, which ought to be removed from the code of the public law of civilized nations, and replaced by the rule, "free ships free goods." (Hear, hear.) It must, however, be admitted, that it has been the practice among European nations for a belligerent State to make prize of enemy's property on board neutral ships; and I will also admit, for the sake of argument, that this practice has been held by many high authorities on international law to be in accordance with those rules of conduct between sovereign States, which constitute the present public law of Europe. But these admissions do not necessarily warrant the conclusion, that the practice in question is right, and conformable to what ought to be the public law of nations, though it is in accordance with the present public law of Europe; for the present public law of Europe may, like the municipal law of many of its individual States, be imperfect in some respects and require amendment, because the present public law of Europe has derived its origin from two distinct sources; partly from those abstract notions of what is right and just, which form what is termed the law of nature; partly from the custom and usage of nations in their intercourse with each other. It is evident that those rules of the present public law of Europe, which are based upon correct notions of what is right and just, cannot require amendment. Not so those rules of the present public law of Europe which have been founded on custom and usage; for the custom and usage of nations, especially with regard to war, have frequently been at variance with correct notions of what is right and just; and the *jus belli*, which has been chiefly founded upon custom and usage, has differed in different nations and in different sets and families of nations. It has varied in the same nation at various periods of its history. It has changed with the change of the religion, manners, and institutions of a nation. Grotius says, "That is often *jus gentium* in one

part of the world which is not so in another." According to Montesquieu, "Every nation has its own law of nations — even the Iroquois, who eat their prisoners, have one; they send and receive ambassadors, they know the laws of war and peace; but the evil is, that their law of nations is not founded upon true principles." The question is, is the rule of the English law of nations, with regard to the capture of enemy's property on board neutral ships, founded on true principles or not? Though this rule has been generally acted upon by European States, in their wars with each other, yet the majority of them have maintained, and still maintain, that the rule in question is an improper one, and have constantly endeavored, by means of treaties, to expunge it from the public law of Europe, and to substitute for it the rule, that enemy's goods should not be liable to confiscation on board neutral ships. I will refer briefly to the arguments which have been urged against the rule of confiscating enemy's property on board neutral ships, by the persons whom I will call the advocates of the extension of neutral rights. They say that, in the earlier periods of history, and among the less civilized nations, the rules of war were far sterner than at present; that the maxim, that it is lawful for a belligerent to injure his enemy by every possible means, was acted upon to the fullest extent; that neutrals scarcely existed, their rights were unknown, and the law of war was the will of the most potent belligerent. But, say they, the tendency of civilization has been, and still is, to mitigate the severity of the code of war, to establish and enlarge the rights of neutrals, and to protect weak neutrals against the tyranny of powerful belligerents, (hear, hear); that this tendency has as yet, however, produced less change in the rules of war by sea than in the rules of war by land; that, at present, the rules of maritime warfare are the same as those which were practised in war by land in rude and barbarous ages; that, for instance, private war by land has been abolished, but private war by sea is still sanctioned by the code of maritime war; that to seize the private property of the peaceful subject of an enemy, for the sake of gain, is repugnant to the usages of modern war by land, and is an act which would meet with the condemnation of all civilized nations; but to do similar acts on the sea, and even to hire foreign buccaneers, with a license to pillage peaceful merchants, is conformable to the present rules of maritime war. (Hear, hear.) Now, say the advocates for the extension of neutral rights, though valid reasons may have been assigned why the laws of war should be sterner by sea than by land, why the rights of neutrals should be more limited on the ocean than on the continent, yet no valid reason has ever been assigned for treating neutrals on the sea in a manner in which neutrals on land have never been treated since the existence of neutrals was recognized. (Hear, hear.) They affirm that the rule of capturing enemy's property on board neutral ships, was introduced into the public law of Europe at a period when the rights of neutrals were little understood, and less cared for; that it was a misapplication to neutrals of the Roman law, with regard to the subjects of belligerents; for when the European States that sprang from the dismemberment of the Roman Empire began to emerge from the barbarism consequent upon the downfall of that empire, the want of some rules to determine the conduct of sovereign States towards each other began to be felt, and attempts were made to frame an international law. The early legists who made those attempts were conversant only with the Roman law; and they adopted, as rules of their public law, many

maxims taken without alteration from the Roman law. In this manner, say the friends of the extension of neutral rights, a grave error was introduced into the public law of Europe, which has been very injurious to the interests of neutrals; for the Roman law was not a public law of nations, but only the municipal law of the Roman Empire. (Hear, hear.) Therefore, the Roman law only determined what ought to be the conduct of the subjects of Rome towards the enemies of Rome; it had no concern with the question of what ought to be the conduct of free and independent neutrals. The Imperators of Rome prohibited, and, as sovereigns, were entitled to prohibit, their subjects from trading with an enemy, or carrying on board their ships the goods of the enemies of Rome. They punished, and, as sovereigns, were entitled to punish, their disobedient subjects with the confiscation of the goods, and even of the ships which contained the goods, of the enemies of Rome. The sovereigns of Europe adopted the provisions of the Roman law, with regard to trade with enemies; but they applied those provisions not only to their subjects, whom they, as sovereigns, were entitled to command, but they frequently extended those provisions to neutrals, over whom they had no sovereignty whatever. (Hear, hear.) It is self-evident, however, that because a sovereign is entitled to issue certain commands to his subjects, and to punish disobedient subjects, it does not follow that the same sovereign is entitled to give the same commands to free and independent nations, and to punish the disobedient as if they were his subjects. Now, under the Roman law, the ship upon which the goods of the enemies of Rome were seized, the ship which was confiscated for containing those goods, and the trade which was prohibited with the enemies of Rome, were the ship and the trade of the subjects of Rome, and not of neutrals. (Hear, hear.) By adopting, as rules of the public law of Europe, the rules of the Roman law with regard to commerce with enemies, the sovereigns of Europe have, at various periods and repeatedly, laid claim to and exercised three rights very injurious to neutrals: namely, the right of capturing enemy's goods, not only on board the ships of their subjects, but also on board the ships of neutrals; secondly, the right of confiscating, not only the ships of their subjects, but also the ships of neutrals, for containing enemy's goods; thirdly, the right of prohibiting, not only the trade of their subjects, but also of neutrals, with the enemy. The last two of these claims have long since been abandoned in theory, though not in practice; the first alone now exists, and the friends of the extension of neutral rights affirm, that it is destined to share the fate of its companions, and ought immediately to be expunged from the public law of civilized nations. (Hear, hear.) They affirm that a neutral State is entitled, in reason and justice, to say to a belligerent:—"As a neutral, I have nothing to do with your quarrel; you may injure your enemy as much as you like, provided that, in doing so, you do not injure me; you may hit your antagonist as hard as you can, but you must not strike me in order to hit him; and if he hurt you, you must not retaliate upon him by hurting me. All that you, as a belligerent, are entitled to demand of me, as a neutral, is, that I will not take any part against you; that I will not directly succor and aid your enemy; that when you are fighting, I will not furnish him with munitions of war; that, when you are blockading his ports or besieging his towns, I will not interfere, nor supply him with the means of prolonged defence; but, provided that I abstain from doing these things, as a neutral, I am entitled to carry on with your

enemy a trade as free and unrestricted as he and I may think proper to permit;" for (say the friends of the extension of neutral rights) the sea is free — Grotius has proved it, and Selden was unable to refute him — therefore, no portion of the ocean is the exclusive property of any State, except that portion of it which is temporarily occupied by the ship of a State; over that portion the State whose ship occupies it has for the time sole and exclusive jurisdiction. A neutral ship is a floating portion of the territory of a neutral sovereign; its inhabitants are his subjects; they are bound to obey his municipal law, and no other law. If they commit crimes on board the ship, they are tried and punished by his penal law; and the ownership of every article of property on board the ship is determined by his civil law. Therefore, (say the friends of the extension of neutral rights, addressing a belligerent sovereign,) your quarrel, with which the neutral sovereign has nothing to do, and to which, as a neutral, he ought to be perfectly indifferent, cannot destroy his rights on the free ocean — cannot entitle you, as a belligerent, to interfere with his floating territory, more than with his fixed territory. (Hear, hear.) But it must be admitted that the subjects of a neutral sovereign, the inhabitants both of his floating territory and of his fixed territory, ought not to directly aid and succor your enemy; for if he were to sanction such conduct on the part of his subjects, he would cease to be a neutral, and would become your enemy. Therefore, he ought to prohibit the inhabitants both of his fixed and of his floating territory from directly aiding and succoring your antagonist; and he ought to authorize you, as a belligerent, and you ought to be authorized by the law of nations, to enforce that prohibition, by visiting his ships and confiscating contraband of war, and by seizing his vessels in the event of their attempting to break through your blockade. But though it must be admitted that the subjects of a neutral sovereign ought to abstain from doing those things, the evident aim and intention of which are to directly succor and aid your antagonist — ought to abstain from all acts which, if done by his commands, or by his ships of war, would justify you in treating him as an ally of your enemy — yet it does not follow that the subjects of a neutral sovereign are bound to abstain from doing those things, which, without directly succoring and aiding your antagonist, may tend to benefit and enrich him, and by enriching him, may tend to strengthen him, and, by strengthening him, may tend to render it more difficult to overcome your enemy. (Hear, hear.) For you must admit, that the established and universally recognized laws of European warfare permit the subject of a neutral sovereign to do many things of this description; that, according to the present public law of Europe, he is entitled to trade with your enemy in every description of goods, except contraband of war; he is entitled to enter any one of your enemy's ports which is not strictly blockaded; he is entitled to load his ships with goods and merchandise, of the produce or manufacture of your enemy; he is entitled to carry off these goods and merchandise, and to sell them in other ports. You cannot deny that the subject of a neutral sovereign is entitled, by the law of nations, to do all these things; but you affirm that he must do them subject to this strange and extraordinary condition, that, during the period that he is carrying the goods in question from one port to another, they should legally cease to belong to your enemy. (Hear, hear.) And (say the friends of the extension of neutral rights) in order to ascertain whether this extraordinary condition is fulfilled, you claim, as a belligerent, the right of stop-

ping neutral ships on the highway of the free ocean, not only for the purpose of ascertaining their nationality, and whether they are carrying contraband of war to your enemy, but for the purpose of searching and minutely inquiring and examining into the legal ownership of every single article of property on board a neutral ship; and if you find any thing on board the ship which you fancy belongs to your enemy — any property, the purchase of which from your enemy you suspect has not been completed according to the strict and technical rules of your law — you claim, as a belligerent, the right of detaining the neutral ship, and of compelling it to change its route, and enter one of your ports, in order that your judges may inquire into and determine the ownership of the property in question; and if your judges decide that, according to the technical rules of that portion of your municipal law, which you call your law of nations, the purchase of the property in question has not been completed, and that its legal ownership is still vested in your enemy, you claim the right of confiscating that property. (Hear, hear.) And (say the friends of the extension of neutral rights) you claim the right of causing these powers to be exercised, not only by the commanders of your regular ships of war, over whom you have direct control, and who are gentlemen, and have the honor and interest of their country at heart, but you claim the right of delegating these powers — at all times odious and vexatious, and which may be used to the great detriment and injury, and even destruction, of the trade and commerce of neutral States — to the freebooters, buccaneers, and foreign cut-throats who man your privateers, over whom you have little or no control — scourges of the ocean, whose object is plunder, and who can only be distinguished from pirates by the mark of your license to pillage. (Hear, hear.) Now (say the friends of the extension of neutral rights) your *status*, as a belligerent, gives you no more right to enter a neutral ship to search for your enemy's property, than to enter a neutral port to search for your enemy's ships. As long as you and the neutral sovereign are at peace, you have no right to meddle with any property on board his ship, except contraband of war. For he is sole and independent sovereign on board his ship, and, in virtue of his sovereignty, all property on board his ship belongs, in fact to him; for he can dispose of it, and does dispose of it, according to his will and pleasure, as declared in the rules of his municipal law. Therefore, as long as you and he are at peace, you have no right to ask any questions about any property on board his ship — either how he became possessed of it, or upon what conditions he acquired it; whether he paid for it in hard cash, or obtained it on credit; whether he holds it for his own use, or in trust for any body else. (Hear, hear.) To insist upon asking these questions, to insist upon determining them in your courts of law, to exercise any power over a neutral ship, which the neutral sovereign neither concedes to you nor admits that you are entitled to exercise, according to what he considers ought to be the rules of international law, are acts of violence, to which neutrals have submitted only when neutrals have been weak and belligerents strong, and which neutrals have resisted, and will again resist, whenever strong enough to defend their rights. (Hear.) Such is the language which the friends of the extension of neutral rights consider that they are entitled to hold towards a belligerent power that claims the right of confiscating enemy's goods, not contraband of war. They would tell the learned gentleman that the position, to the eternal maintenance of which he would pledge the honor of this house and coun-

try, so far from being indisputably true, is demonstratively false. And very many nations would agree with them; for at various times the great majority of European States have been induced, partly by argument, partly by self-interest, to condemn the rule of capturing enemy's goods on board neutral ships; and they have repeatedly endeavored, by treaties and conventions with each other, to expunge that rule from the public law of Europe, and to substitute the rule, that free ships should give freedom to the goods which they contain. For instance, I find that during the century and a quarter that preceded the French Revolution, the all but invariable rule of amicable relations, as established by treaty between the great maritime powers of Western Europe — namely, between England, France, Spain, the United Provinces of Holland, and Portugal — was "free ships free goods;" that is, that the goods of the enemies of one contracting power, being a belligerent, should not be liable to confiscation on board the ships of the other contracting power, being a neutral. This rule is contained in almost every one of the treaties of peace and commerce, which England concluded in the latter part of the seventeenth century, and in the eighteenth century, with the powers I have just mentioned. This is an important fact. I think it affords so strong a precedent for the policy which her Majesty's government have adopted, that I will briefly enumerate the treaties to which I refer. The first English treaty on record, which contains the principle "free ships free goods," was that of Westminster, in the year 1654, between John IV., King of Portugal, and that warrior and statesman, than whom none greater ever ruled the destinies of this nation, who made the name and flag of England respected on every sea, and whose alliance was courted by all the monarchs of Europe. In the 23d article of that treaty it was declared, "that all the goods and merchandise of the enemies of the said republic or king, found on board the ships of either, or their people, or subjects, shall remain untouched." This treaty was confirmed in 1661 and 1703, and continued unaltered till 1810, when the rule, "free ships free goods," was renounced. Therefore, for 156 years the invariable rule of our amicable intercourse with Portugal was, "free ships free goods." I will next pass in review our treaties with France. In the year 1655, the Lord Protector concluded a treaty of peace with Louis XIV., in the 15th article of which it is declared, that "omnes naves ad subditos et populares alterutriusque pertinentes, et in Mari Mediterraneo, Orientali seu Oceano negotiantes, liberæ sint; atque etiam onus suum liberum reddant; licet in illas invehantur mercimonia imo grana, leguminave quæ alterutrius hortium sint." How long the Treaty of 1655 continued in force I am unable to say; but, in 1677, the rule, "free ships free goods," was inserted in the treaty of commerce of St. Germain-en-Laye, and was the rule of our amicable relations with France for the next 116 years. During that period we concluded five treaties of peace and three of commerce with France: namely, in 1677, 1697, 1713, 1748, 1763, 1783, 1786; of these only one, namely, in 1697, and which lasted only for five years, contained no provision with regard to the trade of neutrals during war; in all the others, I have found an article which either expressly contained the provision that the flags of France and England should protect the goods of the enemies of the other, or which renewed the commercial treaty of Utrecht, of 1713, which contained that provision in the fullest manner. I should observe that the commercial treaties of Utrecht, in 1713, were the basis of the commercial relations between

France and England and Spain, before the wars of the French Revolution, and they still are the basis of the commercial relations between this country and Spain, and between Spain and France. I will read an extract from the 17th article of the commercial treaty of Utrecht, between England and France:—"It shall be lawful for all the subjects of the Queen of Great Britain and of the Most Christian King to sail with their ships, with all manner of liberty and security, (no distinction being made who are the proprietors of the merchandise laden therein,) from the places, ports, and havens of those who are enemies of both, or of either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy aforementioned to neutral places, but also from one place belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of the same prince or under several. And it is now stipulated, concerning ships and goods, that free ships shall also give freedom to goods, and that every thing shall be deemed to be free and exempt, which shall be found on board the ships belonging to the subjects of either of the confederates, although the whole lading, or any part thereof, should appertain to the enemies of either of their Majesties, contraband of war being always excepted." (Hear, hear.) The 17th article of the treaty of commerce of Utrecht was repeated *verbatim* in the 20th article of the treaty of commerce of Versailles, of 1786; this treaty terminated with the war of 1793. I have shown, therefore, that from 1677 to 1793 the all but invariable rule of our friendly intercourse with France, the rule, for at least 75 years out of 80 years of peace, was, that "free ships should give freedom to goods." (Hear, hear.) It is worthy of remark, that by the commercial treaty of Utrecht, of 1713, which continued in force, except during periods of war, for the subsequent 80 years, the subjects of one party were entitled, by treaty, to carry on the coasting and colonial trade of the enemies of the other party. I will now refer to our treaties with Spain. The first which contained the principle, "free ships free goods," was the Treaty of Madrid, concluded in 1665. From that period to 1796, a space of 131 years, we concluded with Spain no less than thirteen treaties of peace or commerce: namely, in 1655, 1667, 1670, 1707, 1713, 1715, 1721, 1729, 1748, 1750, 1763, 1783. In every one of these treaties there is an article which either expressly declares, that "free ships shall give freedom to goods," or renews a treaty which contains that provision. Therefore, for the 131 years ending with the year 1796, the invariable rule of our amicable intercourse with Spain, as established by treaty, was, "free ships free goods." It is worthy of remark, that the first additional article of the Treaty of Madrid, of 1814, ratified and confirmed all treaties of commerce which subsisted between England and Spain in 1796; and, consequently, confirmed many treaties, and among others the Treaty of Madrid, of 1667, which contained the provision, that "free ships shall give freedom to goods." The Treaty of 1814 is still in force; consequently, the subjects of Spain are now entitled, by that treaty, to carry in their ships the goods of the subjects of Russia, and if we were to seize Russian merchandise on board Spanish ships, we should be guilty of a breach of treaty. With reference to our treaties with the United Provinces, the first which contained the rule, that "free ships shall give freedom to goods," was signed at Breda, in 1667. It is contained in every one of the treaties which were concluded with the United Provinces during the following 113 years: namely, in 1667, 1668, 1674, 1675, 1685, 1689, 1703, 1711,

and 1716; and it continued in force till the war of 1780, but was not renewed by the Treaty of Paris, of 1784. Therefore, from 1667 to 1780 the invariable rule of our friendly intercourse with the United Provinces, as established by treaty — that is, the rule for 111 years of peace — was, that the ships of the United Provinces should make free the goods of the enemies of England, and be entitled to carry on the coasting and colonial trade of the enemies of England, and reciprocally. The treaties between England and the great maritime powers of Western Europe, to which I have referred, showed that, in the interval between 1654 and 1793, we were six times at war with France, seven times at war with Spain, and three times at war with the United Provinces. We terminated those wars by six treaties of peace with France, seven treaties of peace with Spain, and three treaties of peace with the United Provinces; and, during the same period, we concluded with the same powers and with Portugal eighteen treaties of commerce, or other conventions — in all thirty-four. Of these, only three, namely, two with France, in 1667 and 1697, and one with the United Provinces, in 1784, did not contain any provision with regard to enemy's goods on board neutral ships; but all the other treaties of peace contained a provision to the effect, that the ships of one contracting party, being a neutral, should make free the goods of the enemies of the other contracting party, being a belligerent. I have now made good my position, that, during the century and a quarter which preceded the wars of the French Revolution, the all but invariable rule of our friendly relations, as established by treaty with the great maritime powers of Western Europe, was, "free ships free goods." I think, therefore, that it would be difficult for this house, in the teeth of these facts, to agree to the resolution of the learned gentleman, and to declare that it would be inconsistent with the maritime renown, the security, and honor of this country, to do the very thing which, for a century and a quarter, we generally did when we concluded a treaty of peace or commerce with France, Spain, the United Provinces, or Portugal. (Cheers.) The rule "free ships free goods," is invariably to be found in the treaties of peace and commerce which were concluded between the other great maritime powers during the century and a quarter which preceded the French Revolution. For instance, it is contained in the treaties between France and Spain, of 1659, 1668, 1678, 1721, 1761, 1768, which declared that the subjects of France and Spain should enjoy all the privileges and favors accorded, or to be accorded, to other nations by treaties, and especially by the Treaty of Utrecht, of 1713. These treaties continued in force till the wars of the French Revolution. And in 1814, by the second additional article of the Treaty of Paris, the commercial relations between France and Spain were reëstablished on the footing on which they were in 1792. Therefore the Treaty of Utrecht, of 1713, forms at present the basis of the commercial relations between France and Spain; and, consequently, Spanish subjects are now entitled, by treaty with France as well as with England, to carry in their ships Russian merchandise without danger of confiscation. (Hear, hear.) In the treaties between France and the United Provinces, the rule, "free ships free goods," is contained in the treaties of 1662, 1678, 1697, 1713, 1739, and 1785. In the treaties between Spain and the United Provinces, the rule, "free ships free goods," is contained in the treaties of 1648, 1650, 1673, 1676, 1714, and continued in force till the wars of the French Revolution. In the treaties between Spain and Portugal, the rule, "free ships free goods," is contained in the

treaties of 1667, 1715, 1763, and 1778. The rule, "free ships free goods," was also contained in the Treaty of the Hague, of 1661, between the United Provinces and Portugal, and continued in force till the wars of the French Revolution. I believe that I have now referred to every, or almost every, treaty of peace or commerce, which was concluded between the great maritime powers of Western Europe, from 1654 to 1793. These treaties contain fifty-seven bilateral engagements; of these I can only find three, namely, the treaty of peace of Breda, between France and England, in 1667; that of Riswick, between the same powers, in 1697; and the treaty of peace of Paris, in 1784, between England and the United Provinces, that did not contain the rule, "free ships free goods." Every one of the remaining bilateral engagements contained that rule, either expressly, or by expressly renewing and confirming treaties that contained it; and many of these engagements declared, that the subjects of one contracting party, being a neutral, might carry on the coasting and colonial trade of the enemies of the other contracting party, being a belligerent. I have, therefore, shown, that for the century and a quarter before the wars of the French Revolution, the all but invariable rule of amicable relations, as established by treaty between the great maritime powers of Western Europe, was, that "free ships should give freedom to goods." But it must be admitted that the theory of the great maritime powers, respecting the rights of neutrals on the ocean, as expressed in their treaties of peace and commerce, was altogether at variance with their custom and usage, their practice and edicts, during war. The reason is obvious. During peace men's minds are frequently calm and collected, reason and justice have some influence over them, and the tendency of treaties of peace and commerce is to conform to what ought to be the rules of international law. (Hear.) But in war passion and hatred, and seeming necessity, and the fancied interest of the moment, are apt to determine the actions of combatants; and powerful belligerents, relying on their might, oftentimes set at defiance the best established rules of war. (Hear.) If the maritime rights of neutrals during war were to be inferred from the custom and usages of the great maritime belligerents of Europe during the last two centuries, the inference must be, that neutrals on the ocean have few or no special rights by which they can be distinguished from the subjects of belligerents; for during that period every one of the great maritime powers of the West has repeatedly treated neutrals as subjects, applied to them (as I have already said) all the provisions of the Roman law with regard to trading with enemies, has confiscated not only enemy's goods on board neutral ships, but confiscated neutral ships for containing enemy's goods, and prohibited all neutral commerce with enemies. To show how impossible it would be to deduce the maritime rights of neutrals from the custom and usage of maritime belligerents, I will mention a few instances of the flagrant violation of neutral rights by the great maritime powers within the last two centuries. In 1652, the United Provinces threatened to treat as an enemy any foreigner who should carry any merchandise to England, and to punish him with the confiscation both of his ship and merchandise. In 1689, the United Provinces and England concluded a convention, by which they declared a blockade of all the ports of France, and prohibited neutrals from trading with France, under the penalty of the confiscation both of their ships and goods. In 1543, 1548, 1681, and 1692, France issued edicts, by which the ships of neutrals were to be confiscated for

containing enemy's goods. The French edict of 1704 contained not only the well-known rule, "que la robe ennemie confisque celle d'un ami," but also declared that merchandise of the growth or manufacture of the enemies of France, to whomsoever belonging, should be confiscated, whenever found on board the ships of neutrals. The latter rule, but without the former one, was repeated in the edict of 1744, and continued in force till 1778, when a French edict established, that "free ships should make free goods," and that rule, I believe, at present forms part of the maritime law of France. The conduct of Spain towards neutrals, during war, has been the same as that of France. The Spanish regulations of 1702 and 1718, are said to have been founded upon the French edicts of 1681 and 1704, by which, as I have already said, neutral ships were confiscated for containing enemy's goods, and merchandise of the growth or manufacture of an enemy, to whomsoever belonging, was confiscated on board neutral ships. These regulations were repealed by the Spanish edict of 1779, which adopted the rule, "that free ships should make free goods." Nor has this country, in periods of war, shown greater respect than our neighbors for the rights of neutrals. By means of fictitious blockades we have repeatedly claimed the right of stopping the trade of neutrals with our enemies. For instance, in 1689, as I have already said, in company with Holland, we declared a blockade of all the coasts of France, without sending a single ship to enforce the blockade; and we prohibited neutrals from trading with France, under the penalty of the confiscation both of their ships and their goods. This was the famous "cannon" law, as our third William called it; for it had no other sanction, human or divine, save the force of a bullet. In 1756, we prohibited the Dutch from trading with the colonies of France; and laid down the famous rule of war in that year, in virtue of which we claimed a right of prohibiting all neutral trade with the colonies, and on the coasts of our enemy. This rule was much contested by the United States of America, and other powers; and was a fruitful source of contention between them and us. Again, in 1793, we concluded treaties with Spain, Prussia, Russia, and the Emperor of Germany, for the purpose of forbidding neutrals to trade with France. Lastly, in the war that followed the peace of Amiens, the combatants retaliated the blows which they aimed at each other, by striking neutrals, and vied in disregarding neutral rights. According to Alison, the rage of the belligerent powers, and the mutual violation of the law of nations, could not go beyond our Orders in Council and the Berlin and Milan decrees. In consequence of the conduct which was pursued towards neutrals by the maritime powers of the west of Europe, in their frequent wars, the powers of the north of Europe, who were generally neutrals in those wars, repeatedly formed leagues to defend their rights, as neutrals, and took up arms for that purpose. The first armed neutrality, as these leagues were termed, was a convention, in 1693, between Sweden and Denmark, to resist, by force of arms, the execution of the convention between the United Provinces and England, to put a stop to all neutral trade with France. This armed neutrality seems to have been successful, and the allies had to abandon their project. In the war of 1744, in consequence of our searching, and detaining, and capturing enemy's goods on board Prussian vessels, the King of Prussia refused to pay the interest of the Silesian Loan until we had made reparation to his subjects, by a payment of £20,000. (Hear.) The second and most celebrated armed neutrality was in 1780; its objects were to

resist our rule of war of 1756, with regard to trading with the colonies, or on the coasts of our enemies, and to establish the rule, that "free ships should make free goods." This armed neutrality consisted of conventions which Russia concluded with Denmark, Prussia, Austria, Portugal, and the Two Sicilies, and to which Spain and Holland acceded. It attained its object; and, in the treaties of peace which we concluded in 1783, with France and Spain, we recognized, as far as those two powers were concerned, the main principles of the armed neutrality of 1780, and renewed treaties — namely, those of Utrecht, of 1713, which contained the rule, "free ships free goods." The third armed neutrality was concluded in 1794, between Denmark and Sweden, for the protection of their trade during the war of the French Revolution; it was not successful. And the fourth armed neutrality, the principles of which were the same as those of the armed neutrality of 1780, was formed in 1800, by treaties that Russia concluded with Sweden, Denmark, and Prussia. This armed neutrality was speedily brought to an end by the murder of the Emperor of Russia. The principles of the armed neutrality are to be found in the treaties of 1782 and 1814, between Russia and Denmark; of 1800 and 1809, between Russia and Sweden; and of 1818, between Prussia and Denmark. These treaties and leagues show how anxious the northern powers have generally been to expunge the rule of confiscating enemy's goods on board neutral ships from the public law of Europe, and to institute the rule, "free ships free goods." I must observe, however, that the rule, "free ships free goods," is not contained in some of the treaties between the northern and western powers. (Hear.) For instance, it is not contained in the treaty of commerce of Copenhagen, concluded in 1670, between Great Britain and Denmark, which was renewed by the Treaty of Kiel, of 1814; nor is it contained in the treaties between Great Britain and Sweden, signed at Upsal, in 1654, at Westminster, in 1656, at Whitehall, in 1661; all of which were confirmed by the Treaty of Orebro, of 1812. These treaties are still in force; and, from various articles in them, the inference may fairly be drawn that we are now entitled, by treaty, to confiscate enemy's goods on board neutral ships belonging to Sweden and Denmark. Nor was the rule, "free ships free goods," contained in any of our treaties with Russia; on the contrary, in the maritime convention of St. Petersburg, of 1801, to which Sweden and Denmark acceded, the 2d article declared that enemy's goods should not be free on board neutral ships. On the other hand, the treaties which Russia concluded with Austria, in 1785, with France, in 1787, and with the Two Sicilies in the same year, contained the stipulations of the neutrality of 1780. The rule, "free ships free goods," is also to be found in the treaties between Russia and Portugal, of 1787 and 1798, the latter of which was renewed by the declaration of 1815. The same rule was contained in the treaties between Denmark and France, of 1663, 1742, 1749, and 1813; and, according to eminent French authorities — namely, D'Hauterive and Hautefeuille — is still in force between France and Denmark. Consequently, at present the Danes are entitled, by treaty with France, to carry Russian goods from one Russian port to another Russian port, the ports not being blockaded. The rule, "free ships free goods," was also contained in the treaties between Denmark and Spain, of 1742 and 1814; and in those between Sweden and the United Provinces, of 1679 and 1686. I think that I have referred to every, or nearly every, international engagement of the last two centuries between the

northern powers, or between them and the western powers, which contained a specific stipulation with regard to the goods of an enemy on board the ship of a neutral. There were several treaties that contained no stipulation on the subject, but those that did were about forty in number; of these only nine, (to every one of which England was a party,) stipulated that the goods of an enemy in the ship of a friend should be lawful prize. The remaining thirty-one contained the rule, "free ships free goods;" and most of them contained the principles of the armed neutralities of 1780 and 1800. The armed neutrality of 1780 was an offspring of the American War of Independence. The United States at once declared in favor of its principles, and adopted its provisions as rules of the public law of the New World. For the rule, "free ships free goods," is to be found in the treaties which the United States concluded with France, in 1778 and 1800; with the United Provinces, in 1782; with Sweden, in 1783, 1816, and 1827; with Prussia, in 1785; and, though the rule was temporarily suspended in the Treaty of 1799, with Prussia, it was reëstablished in 1828. The only instance in which the United States adopted the rule, that the goods of an enemy in the ship of a friend is lawful prize, was in a treaty with this country, in 1794. But in 1795 the United States concluded a treaty with Spain, which contained the rule, "free ships free goods." It was renewed in 1819, but with this reservation, that the rule should only be acted upon when all the belligerents assented to it — for example, the ships of the United States, being a neutral, were only to render free the goods of the enemy of Spain, being a belligerent, when the enemy of Spain also acted upon that rule. About thirty years ago the South American colonies of Spain shook off the yoke of their mother country, and became independent; they then entered into negotiations with the United States, and the United States declared that the rule of public law, that the property of an enemy is liable to capture on board the vessels of a friend, has no foundation in natural right; and, though it be the established usage of nations, rests entirely on the abuse of force. For these reasons, the rule, "free ships free goods," is to be found, I believe, in every treaty which the United States has concluded with the States of South America — for instance, with Colombia, in 1824; with the States of Central America, in 1825; with Brazil, in 1828; with Mexico, in 1831; with Chili, in 1832; with Bolivia, in 1836; with Venezuela, in the same year; and with Ecuador, in 1843. I would observe that, in almost all these treaties with the States of South America, the United States stipulated that the rule, "free ships free goods," should only be enforced when all the belligerents assented to act upon it; for, though the United States maintained in the strongest manner that the rule in question ought to be contained in the public law of nations, yet they asserted that, if one belligerent were to act upon that rule and the others were to adopt the contrary rule, of confiscating enemy's goods on board neutral ships, the belligerent who acted upon the right rule would be unjustly damnified, and he who acted on the wrong rule would be unjustly benefited; therefore the United States stipulated, in the treaties in question, that the rule, "free ships free goods," should be subject to the limitation which I have mentioned, until the progress of civilization and the consent of all civilized nations should establish it, as an undoubted rule of public law. France has also concluded numerous treaties with the States of South America, in which it has been generally stipulated that France should not impose upon neutrals, in time of war, any other obliga-

tion than that of submitting to the laws of effective blockade. I am informed that this stipulation is contained in the treaty which France concluded with Brazil, in 1826; with Bolivia, in 1837; with Ecuador and Venezuela, in 1843; with New Grenada, in 1846; with Guatemala, in 1848; with Costa Rica, in the same year; and with Hayti, in 1852. Lastly, I should observe that the Ottoman Porte is at present bound by its capitulations of 1604, with France; of 1675, with England; of 1783, with Russia; and, probably, by those of 1784, with Austria; of 1740, with the Two Sicilies; of 1732, with Spain; of 1680, with Holland; of 1790, with Prussia, not to confiscate any goods, except contraband of war, on board the ships of the nations which I have just mentioned. I have now enumerated one hundred and thirty international engagements between the chief powers of the civilized world. They are all, or nearly all, the international engagements between those powers during the last two centuries, which contain distinct provisions with regard to the treatment of enemy's goods on board neutral ships. There are many treaties and conventions which contain no provision on that subject; but of the one hundred and thirty that do, only eleven (to ten of which England was a party) contain the rule, that the goods of an enemy in the ship of a friend are lawful prize; the remaining one hundred and nineteen contain the rule, "free ships free goods." I have now shown that, during the century and a quarter which preceded the wars of the French Revolution, the all but invariable rule of amicable intercourse, as established by treaties between this country and the great maritime powers of Western Europe, and the invariable rule between those powers, was "free ships free goods." I have also shown, that the general rule of amicable intercourse, as established by treaty between the northern powers, between the northern and western powers, (with the exception of England,) between the United States and the Old and the New Worlds, between France and the New World, and between the Porte and the great powers of Europe, was "free ships free goods." I am, therefore, entitled to assert, that though it has been the custom and usage of nations to act upon the rule of capturing enemy's goods on board neutral ships, yet that custom and usage have been and still are held, by the great majority of the civilized nations, to be at variance with correct notions of what is right and just. Now, an eminent modern writer on jurisprudence, (Mr. Austin,) in defining international law, states that "the rule regarding the conduct of sovereign States, considered as related to each other, is termed law, by its analogy to positive law, being imposed upon nations or sovereigns, not by the positive command of a superior authority, but by opinions generally current among nations. The duties which it imposes are enforced by moral sanctions, by fear on the part of sovereigns of provoking general hostility, and incurring its probable evils in case they should violate maxims generally received and respected." If this be a correct definition of international law, or rather of what ought to be international law, it follows that the rule, "free ships free goods," ought to be a rule of international law. Or, at least, it follows that the position contained in the resolution of the learned gentleman, namely, that the goods of an enemy in the ship of a friend are lawful prize, is not indisputably true, and, therefore, the House ought not, as I have already said, by agreeing to the motion of the learned gentleman, to pledge the honor of this country to uphold it forever. I must observe that, in the treaties to which I have referred, with the exception of those which contained the principles of the

armed neutrality of 1780 and of 1800, the rule, "free ships free goods," has been accompanied by the rule, "enemy's ships enemy's goods," in virtue of which the goods of neutrals were liable to confiscation on board enemy's ships. This rule was a convenient one for belligerents. It saved them the trouble of determining the ownership of any property on board an enemy's ship. And, therefore, those powers who agreed to the rule, "free ships free goods," generally stipulated that neutrals should pay for the lenity of that rule, by the confiscation of their property when found on board an enemy's ship. But between the two rules, of "free ships free goods," and "enemy's ships enemy's goods," there is no logical connection; the only connection between them is the jingling of a verbal antithesis. Now every writer, ancient and modern, on international law, has condemned the rule, "enemy's ships enemy's goods," as contrary to the principles of public law. Grotius expressly condemned it, so did Bynkershoek, Heineccius, and Vattel; so has Hübner, Klüber, De Rayneval, and Hautefeuille. As there is no logical connection between the rule, "free ships free goods," and the rule, "enemy's ships enemy's goods," it follows that we were under no logical nor moral obligation to adopt the latter rule, because we held it to be right and expedient, in existing circumstances, to adopt the former rule. This brings me to the practical question of political expedieney. The learned gentleman had admitted that it is proper, under the circumstances of this war, to waive, for the present, the right of confiscating the goods of Russian subjects in the ships of a neutral; but, as the honorable gentleman who followed him disputed the propriety of making any relaxations, I will make a few observations on that subject. I think every one must admit that it is all-important, for the successful prosecution of the war now waging with Russia, that France and England should cordially coöperate, by sea as well as by land. (Hear, hear.) It is self-evident that cordial coöperation could not be attained, if one power were to act upon one rule of maritime war and the other upon an opposite rule. (Hear, hear.) For complete harmony of action, it is indispensable that both powers should adopt the same rules of maritime war. But, as I have already shown, according to the international laws of France and England, their rules of maritime war were different. The French were bound, by their law of nations and by numerous treaties, to respect enemy's goods on board neutral ships, but they were entitled to confiscate the goods of neutrals on board enemy's ships. On the other hand, we were bound, by our law of nations, to respect the goods of neutrals on board enemy's ships; but we were entitled to confiscate enemy's goods on board neutral ships. It is evident, therefore, that, with regard to neutrals, the French rules of maritime law clashed with our rules. It is easy to see that, if each power had insisted upon adhering to its own rules of war, it would have been impossible for the cruisers of the two powers to act cordially in concert. (Hear.) For instance, suppose that two cruisers — one an English, the other a French — had been sailing together in the Baltic, and that each had received instructions to act according to the national rules of reprisals, the French according to the French rules, the English according to the English rules. Suppose the two cruisers had met a neutral ship, carrying from and to a non-blockaded port a cargo of goods and merchandise of the growth and manufacture of Russia, but not contraband of war. Both cruisers would have stopped the ship, their respective officers would have visited it; both would, in the first instance, have

asked the same questions, both would have ascertained the nationality of the ship, both would then have inquired whether there was any contraband of war on board. Finding none, the French officer would then have said to the master of the ship, "By the French law of nations, and also by virtue of a treaty between France and your sovereign, I have nothing more to do on board your ship, and I wish you *un bon voyage*." Not so the English officer. After his French comrade had taken leave, he would have carefully and minutely searched the ship; he would have found that it was laden with goods and merchandise of the growth and manufacture of Russia; he would then have inquired to whom the property belonged, how it had been acquired, and on what terms; and if he suspected that any portion of it belonged to a Russian subject; if he fancied that the purchase of it from a Russian subject had not been completed according to the strict and technical rules of English law, the English officer would have been bound to detain the neutral ship, would have been bound to take it to an English port, to be adjudicated upon by English judges, according to English law; then, perhaps, the cargo would have been condemned, and the English officer and his crew might have acquired considerable wealth, by the confiscation of property which the French officer and his crew had refused to touch. Thus, the French cruiser would have permitted the ship of every neutral State, of the northern powers, those of the United States, of Spain, and of the South American Republics, &c., to pass free, though full of valuable goods belonging to Russians, while the English cruiser, sailing in company with the French one, would have reaped a rich harvest of prize and booty, by detaining every one of those ships except such as belonged to Spain, which we are bound by treaty to respect. On the other hand, I should observe that, if a Russian ship had been captured by the French cruiser, the French would have been entitled, by their law of nations, to confiscate all property on board the Russian ship, to whomsoever the property might have belonged, whether to subjects of Russia, of the United States, of Spain, &c.; but had our cruiser captured a Russian ship, we should have been bound, by our law of nations, to restore all property of neutrals on board that ship, not being contraband of war, to their owners, provided they were not Spanish subjects. Therefore it is self-evident that if France and England had insisted upon adhering to their respective codes of maritime war, the difference in their rules of taking prize and booty would have sown the seeds of dissension, jealousy, and ill will between the crews of their respective fleets, and rendered cordial coöperation in maritime war impossible. Neutral States would likewise have had good reason to complain if the cruisers of England and France, sailing in company, had acted upon opposite rules of maritime war; for the consequence would have been, to inflict upon neutrals the penalties of both the French and English codes, without granting them the immunities of either. For instance, neutrals have frequently considered that the severity of the English rule of confiscating enemy's goods on board neutral ships was, in some degree, mitigated by the lenity of the English rule of respecting neutral's property found on board enemy's ships. On the other hand, neutrals have held that the lenity of the French rule, "free ships free goods," was paid for, to a certain extent, by the severity of the French rule, "enemy's ships enemy's goods." Now if a French and an English cruiser, sailing in company, had acted upon the rules of their respective codes of maritime law, the French cruiser would have confiscated neutral property on board

Russian ships, and the English cruiser would have confiscated Russian property on board neutral ships; and, between the two, the unfortunate neutral would, as I have already said, have suffered the penalties of both codes of maritime war, without enjoying the immunities of either; and neutral States would have had grounds of complaint at least as valid, as those which gave rise to the celebrated armed neutrality of 1780. It was, therefore, of paramount importance that the French and English rules of maritime war should, if possible, be assimilated, at least for the present. There were three modes by which this result might have been accomplished: either France might have yielded to England, and adopted the English rules of maritime war; or England might have yielded to France, and adopted the French rules of maritime war; or both powers might have made, as they did make, mutual concessions. (Hear.) Now, neither power could have yielded entirely to the other, and have adopted the other's rules of maritime war, without doing wrong: for, though both powers were entitled to waive rights, neither power could with honor have disregarded obligations. For instance, France could have waived her right to confiscate neutral goods on board Russian ships, and England could have waived her right to confiscate the property of Russians on board neutral ships; but France could not, with honor, have disregarded the obligation, imposed upon her by numerous treaties, as well as by her law of nations, of respecting the property of Russians on board neutral ships; nor could England have set aside the obligation imposed upon her by her law of nations, of respecting neutral property on board Russian ships. (Hear, hear.) Therefore, the only honorable compromise which France and England could have made with regard to their rules of maritime war, must have been based upon a mutual waiver of rights and a strict fulfilment of obligations. This is the compromise which has been made. (Hear, hear.) France waived her right of confiscating neutral property on board Russian ships; England waived her right of confiscating Russian property on board neutral ships. The rules of maritime war of the two nations are now the same. We can cordially act together against the common enemy, and neutral States have no grounds of complaint against us. Russia has imitated our example. May that example be followed by future belligerents in future wars! For if the precedent set by this war should lead to the abolition of private war on the ocean, and to the establishment of the maritime rights of neutrals on the firm and solid basis of reason and justice, whatever other results this war may bring about, it would be noted for these results in the history of the law of nations, as a step in civilization and a benefit to the human race. (Hear, hear.) I have shown on the assumption that a belligerent State ought to have the right of confiscating enemy's property on board a neutral ship, that it was right and proper for this country to waive, for the present, that belligerent right. I have likewise shown that the opinions current among the majority of civilized nations are in favor of the rule, "free ships free goods." Therefore, I infer that reasonable doubt may be entertained of the truth of the proposition contained in the resolution of the learned gentleman; and, consequently, that the House ought not, by agreeing to the motion of the learned gentleman, to pledge the honor of the country to uphold forever the position, that the "goods of an enemy in the ship of a friend are lawful prize." Lastly, I will assume, only for the sake of argument, that the position in question is indisputably true. Nevertheless, the House ought not to assent to the resolu-

tion of the learned gentleman, unless he can show some great, positive, and practical good would result from agreeing to it. For we are not a body of publicists, assembled for the purpose of discussing and determining abstract questions of international law; but a body of practical men, whose duty it is to act, or to determine how the government of this country should act, in existing circumstances. Our resolutions should, therefore, have for their end and aim immediate action; and, consequently, it would be unwise and inexpedient to limit our freedom of action, or that of our successors, by laying down abstract rules of action, without some well-proven necessity for so doing. Now, what great, positive, and practical good does the learned gentleman expect to obtain from the House agreeing to his resolution? Does he wish, by means of it, to compel future governments, in future wars, to insist upon confiscating enemy's goods on board neutral ships? But if the circumstances of future wars should be the same as those of the present war, future governments should act as we have acted; for I have shown that we have acted rightly. (Hear, hear.) Therefore, if his resolution were to prevent them from following our example, it would be mischievous in the extreme. On the other hand, if in future wars it should be right and proper to insist upon every belligerent right appertaining to us by the law of nations, the resolution of the learned gentleman is not wanted to enable us to do so, because we have not renounced nor surrendered any belligerent right appertaining to us by the law of nations. For, in the declaration of the 28th of March last, in which her Majesty was graciously pleased, by the advice of her responsible ministers, to declare that, "to preserve the commerce of neutrals from all unnecessary obstruction, she was willing, for the present, to waive a part of the belligerent rights appertaining to her by the law of nations," her Majesty did not renounce or surrender any one of her belligerent rights. For I need hardly assure the learned gentleman that, to "waive, for the present, a right," and to surrender it, are two quite distinct things. But the learned gentleman is not content with her Majesty's declaration to neutral States. He asks this House to make a declaration to neutral States, in a tone and spirit very different from that of March last; and, in my opinion, in a very objectionable tone and spirit. For what does he ask the representatives of the people of this country to declare to neutral States? He asks them to say, in so many words — "The peculiar circumstances of this war have induced us reluctantly to relax the principle, that the goods of an enemy in the ship of a friend are lawful prize. The force of events have compelled us, against our will, to waive, for the present, our belligerent right of confiscating Russian goods on board your ships; yet be assured we have no intention to make any permanent concession to your wishes, or in any way to acknowledge the justice of your demands. On the contrary, we maintain that the right in question is so clearly incorporated with our law of nations, and so interwoven with our maritime renown, that to renounce or surrender it would be inconsistent with the security and honor of this country. Therefore we are determined, whenever circumstances will permit, rigorously to enforce that right, in spite of your remonstrances and in defiance of your protests." Such language would be neither politic nor dignified. In dealing with other States, we ought to make up our minds to what is right and just to do, and do it; but we should carefully abstain from threats, and boasts of what we will do. To do one thing one day, and to vapor, and to fume, and to fret, and to

swear that we will do quite another thing another day, would be conduct unworthy of a mighty nation. It would best befit one of Falstaff's ragged regiment. And the terms of the motion irresistibly remind one of the declaration of Ancient Pistol, while eating the leek under the compulsion of Fluellen's cudgel, that he would yet have his revenge. The rule of "free ships free goods" is the leek which the honorable and learned gentleman is eating, but he vows he will have his revenge by future confiscation. (Hear, hear.) I am convinced, therefore, that the House ought not to consent to the resolution of the learned gentleman; for I have shown that it contains a proposition condemned by the majority of civilized nations — one of doubtful truth — to the upholding of which the House ought not to pledge the honor of the country; that the resolution, if carried, may be mischievous, can never be useful, and is both impolitic and undignified. (Hear, hear.) The right honorable gentleman concluded by moving the previous question.

Mr. R. PHILLIMORE trusted the House would listen to him for a few moments, while he expressed, for the first time, his opinion on a subject interesting to that House, and to the country at large, and with which his professional studies might be supposed to have made him in some degree acquainted. He could not assent to many of the propositions which the right honorable gentleman had enounced to the House; but he was happy to say that he entirely concurred in the wisdom and expediency of the course pursued by the government, in waiving the undoubted belligerent rights of the crown in the present instance, as well as in all that had fallen from the right honorable gentleman, as to the necessity of acting in harmony with our ally, France, and in making, for that object, mutual concessions. (Hear.) He was, however, at a loss to reconcile the language of her Majesty's declaration of March last, with the speech of the right honorable gentleman. (Hear.) In that declaration her Majesty was made to say, in very temperate and appropriate terms, that she was willing, for the present, to waive part of the belligerent rights appertaining to her by the law of nations; but the whole tenor of the right honorable gentleman's argument was, that those rights were such as the crown ought never to have exercised; and when the right honorable gentleman taunted his (Mr. Phillimore's) honorable relative with something like swaggering, the right honorable gentleman ought to have recollected that he had a pretty little leek of his own to devour, if he had any thing to do with the drawing up of her Majesty's declaration. (Hear, and a laugh.) Two things could not be conceived more inconsistent than her Majesty's declaration and the right honorable gentleman's speech. If, as it was insinuated, his honorable relative had wandered out of the way, he had the consolation of knowing that he had wandered out of the way with such men as Mansfield, Stowell, Grenville, and other distinguished jurists and statesmen. It might be that all the doctrines laid down by Lord Stowell in the last war were wholly unworthy of adoption by the right honorable gentleman, who to-night had expressed the opinions of the government: but this was certain, that those doctrines had given the law to Europe and America. So far from American jurists expressing the opinions put into their mouths by the right honorable gentleman, no one could study their opinions without seeing that they maintained all the doctrines laid down by Lord Stowell. The Americans, who suffered the most from their application, were the first to acknowledge their wisdom; and the foremost act of the American Republic was

directly in opposition to what had been stated that night by the right honorable gentleman. In support of this view, the honorable and learned gentleman quoted the opinion of Wheaton, the American jurist; and then proceeded to say, that the House must have heard with astonishment the right honorable gentleman's proposition that, for the purpose of discovering what was the law of nations, they must look to treaties. That was the very proposition which the King of Prussia endeavored to enforce on this kingdom in 1747, and was declared by Lord Mansfield to be contrary to both ancient and modern practice, the general rule being strongly proved by the exceptions made in the treaties themselves. The House had, therefore, to decide whether, in respect to the exposition of national law, it would prefer the authority of the right honorable gentleman or that of Lord Mansfield. The right honorable gentleman's argument, if carried out to its legitimate conclusion, would prevent this country stopping neutral vessels from entering even blockaded ports. The reluctance with which the present war had been entered upon, and the vigor and activity displayed in its conduct when once it began, reflected credit on the country; but the fact was, that in this new arrangement made with respect to prizes, the government stood upon no principle, but rather upon a relaxation of a principle — the relaxation of the law of nations. He should not have risen, but that he found it impossible to concur in the doctrines laid down by the right honorable baronet. It might be owing to his unenlightened mind. (Hear, hear.) The honorable gentleman cheered. (Hear, hear.) He had not, he confessed, the advantage of being illuminated by those great lights which had shed their lustre on the mind of the honorable gentleman. He had contented himself with groping in the dark with those masters of antiquity, from whose pages he was not ashamed to acknowledge he had borrowed all that he knew upon the subject. It might appear a little strange that the doctrine which the right honorable gentleman had maintained, on behalf of the liberal principles which he was known to represent, was precisely the doctrine which the Autocrat of all the Russias insisted upon in 1780. Now, he (Mr. R. Phillimore) might at least be allowed to say, that the authority of Lord Stowell, Lord Mansfield, and Lord Grenville, was as good as that of the Autocrat of all the Russias. In dealing with this question, there was a point which the right honorable baronet had not adverted to — namely, that the armed neutrality, in 1780, was at a period of England's greatest peril and greatest weakness. All her enemies took the opportunity of wresting from her what they conceived to be the mainstay of her maritime renown. He could not imagine that they were influenced by any abstract love of justice; because, as Lord Stowell observed, they all endeavored to forget their own principle. Before the year 1800, there were but a small portion of those who constituted the armed neutrality of 1780, who had not abandoned their principle. And why? Because they found that it was inconsistent with belligerent rights. He heard the right honorable baronet with most unfeigned astonishment when he said that, by virtue of treaties, Spain and other countries had a right to carry any goods belonging to the belligerent powers.

Sir W. Molesworth said he had only alluded to Spain.

Mr. R. Phillimore said he would take his stand there, then, and would contend that there was not any treaty existing with Spain, which would enable her to carry an enemy's goods free from seizure and confiscation. But, after all, the

principles of the law of nations were not founded upon treaties, which might be entered into under prejudiced circumstances. They were founded upon reason, upon equity, and upon convenience, and were fortified by authorities. When the right honorable baronet referred, in a sneering manner, to the law of nations, as being founded merely upon municipal regulations relating to the internal commerce of a country, he begged to say that the right honorable gentleman made a very great mistake, and one which any tyro in the law would not have made. The principles of the law of nations were those maxims of equity which had been sanctioned throughout the whole civilized globe. The law of nations was referred to for the purpose of showing that there were, both by usage and by habit, rules observed between civilized nations, which it was not competent for any one nation to repeal without the assent of other nations. If the doctrine were to prevail which he had heard advanced this night, that each and every nation had an international law of its own, which it was competent for each and every such nation to repeal, nothing would be more perilous to the peace and well being of society. The wildest republican had never maintained a doctrine more certain of producing universal war, than such a doctrine as had been broached to-night. He was surprised that the right honorable gentleman, with his acute mind and varied information, had not perceived the great value which ought to be ascribed to the recognized and acknowledged power of these laws, in irresistibly binding together the various nations of the globe. The right honorable gentleman, at the end of his speech, slightly referred to the names of Grotius and Puffendorff, who, Sir James Mackintosh said, were valuable beyond all price; because they laid down the maxims and usages agreed to by all the nations of Europe, and to which, when one nation was at issue with another, both might with confidence refer. It was not that their authority was incontrovertible, but it was because their impartiality could never be questioned. He remembered Sir James Mackintosh saying, that no man ever questioned their authority who had not previously made up his mind to violate the rules they had laid down. In conclusion, he would suggest to his honorable and learned relative the inexpediency of pressing his motion to a division. He thought his honorable relative might be content with the statement contained in the fourth declaration of her Majesty, dated 28th March, 1854, that while it was impossible for her Majesty to forego the exercise of her right of seizing articles contraband of war, and of preventing neutrals from bearing the enemy's despatches, and that she must maintain the right of a belligerent to prevent neutrals from breaking any effective blockade, which might be established with an adequate force against the enemy's forts, harbors, or coasts; yet her Majesty would waive the right of seizing enemy's property taken on board a neutral vessel, unless it were contraband of war.

Mr. Bowyer said, that after the speech of the right honorable baronet, (Sir W. Molesworth,) no very lengthened argument was necessary to be urged on this subject, though he considered the question of sufficient importance to be fully discussed, in order that the practice of nations, with regard to maritime war, should be adapted to the progress of civilization and to the present condition of Europe. He would address himself at once to the immediate point before the House. On what authority did the doctrine rest, which was contended for by his honorable and learned friend the member for Leominster? It was stated by

Wheaton, the authority whom he had himself quoted, by which it appeared that the position, that an enemy's goods in neutral vessels were subject to capture, rested upon usage and custom alone. Kent also asserted the principle, that neutral vessels did not save an enemy's goods; but he added that England had pushed that doctrine very far, that America did not agree with the decisions of the English Court of Admiralty, though it was probable that, when America's maritime power became greater, she would assert the same doctrine. It appeared from these authorities that that doctrine did not rest upon any sound principle of public law, but upon what nations found convenient, and upon usage. But usage was only binding when based upon justice and equity. In fact usage could only by an impropriety of language be called a part of the law of nations. It was only binding so long as nations chose to follow it. Any nation that did not wish to be bound by it had only to give due notice, so as to prevent any inconvenience or wrong being inflicted upon those with whom it dealt. With regard to the custom of nations, if they went back to the customs of former ages, to what absurdities would they come? Why, the system of slavery was from the usage of nations. There was a time when the usage of nations made prisoners of war slaves, and when it justified putting prisoners of war to death. But we must not, in our time, follow mere usage; but must see what justice and what the present position of the world required, and what the progress of civilization required on the grounds of common sense. During the last war, the Court of Admiralty, under the presidency of Lord Stowell, extended the rights of belligerents as far as possible. Now, however, we were pursuing an opposite course, and, in conjunction with the Emperor of the French, were opening a new era in the law of nations, by extending the rights of neutrals. We had embarked in a wise course, but we must not stop short. The rights of neutrals must be extended further, and the rights of belligerents further restricted. By allowing neutrals to trade with the enemy, we placed them in a more advantageous position than that occupied by our own subjects. This was absurd.

London Times, July 5, 1854.

ADDENDA TO THE NOTES.

PAGE 30, NOTE *a*.

[Whether the Treaty, of 1783, was the origin of the territorial sovereignty of the States of the American Union, was discussed during the long pending controversy in relation to the North-Eastern Boundary of Maine. The British Secretary of State for Foreign Affairs, Lord Aberdeen, having assumed, in his note of August 14, 1828, as the ground for claiming exclusive possession till the award of the arbiter was rendered, that the American title to the territory in dispute was to be deduced solely from the treaty of peace, it was replied: —

"Before the independence of the United States, not only the territory in dispute, but the whole of the adjoining Province and State, was the property of a common sovereign. . . .

"To use the words of a celebrated authority, 'When a nation takes possession of a distant country, and settles a colony there, that country, though separated from the principal establishment, or mother country, naturally becomes a part of the State equally with its ancient possessions.'

"From the principle here established, that the political condition of the people of the mother country and of the colonies during their union is the same, the inference is unavoidable that, when a division of the empire takes place, the previous rights of the common sovereign, on matters equally affecting both of the States, accrue as well to the one as to the other of them.

"From the possession of the disputed territory by his Britannic Majesty, anterior to 1776, a title by prescription or first occupancy might, therefore, with the same propriety, be asserted for Massachusetts, of which the present State of Maine was then a component part, as for Nova Scotia, through which latter Province the pretensions of New Brunswick are deduced.

"The undersigned cannot admit 'that the United States rest their claim to the possession of the territory upon the Treaty of 1783,' in any other sense than that in which his Britannic Majesty founds, on the same treaty, his claims to New Brunswick. By the instrument in question, which, besides being a treaty of peace, was one of partition and boundaries, the title of the United States was strengthened and confirmed, but it was not created. It had existed from the settlement of the country. Where this treaty is applicable, it, equally with all other conventional agreements between nations, is of paramount authority, and many of its provisions are, from their nature, of a permanent character; but its conclusion,

though it created new claims to territory, did not destroy any prior right of the people of the United States that was not expressly renounced by it.

"The title to the district in controversy, as well as to all the territory embraced in the original States, is founded, independently of treaty, on the rights which belonged to that portion of his Britannic Majesty's subjects who settled in his ancient colonies, now embraced in the American Union, and upon the sovereignty maintained by the United States, in their national character, since the 4th of July, 1776.

"To the general rights of colonists under the law of nations allusion has already been made. To the particular situation of the inhabitants of the country, now comprised in the United States, it is therefore not necessary further to refer, than to recall to the recollection of Lord Aberdeen that they were not a conquered people, but subjects of the King of Great Britain, enjoying the same rights with Englishmen; and, although they acknowledged the authority of a common sovereign, the right of the Parliament of the mother country, in which they were unrepresented, to interfere in their internal concerns, was never acquiesced in.

"From the Declaration of Independence, in 1776, the claims of the United States, in their national character, to all the territory within the limits of the former thirteen colonies, are dated. Of the fact of their being in possession of sovereignty, comprising, of course, the rights of territorial jurisdiction, no further proof can be required than that they exercised all its highest prerogatives. Nor were these confined to the limits of their own country. Treaties of amity and commerce, and of alliance, were made with France, as early as 1778; and similar arrangements were entered into by the United States with other foreign powers, before any settlement of boundary was attempted to be defined by convention, between the American States and the adjacent provinces.

"The terms, as well of the provisional articles of 1782, as of the definitive treaty of the succeeding year, may be cited in confirmation of the view here taken. By the first article of both these instruments, his Britannic Majesty acknowledges the said United States; namely, New Hampshire, Massachusetts-Bay, &c., &c., 'to be free, sovereign, and independent States; that he treats with them as such; and, for himself, his heirs, and successors, relinquishes all claims to the government, propriety, and territorial rights of the same, and every part thereof.'

"This language is sufficiently different from that employed where it is intended to convey territory by a grant in a treaty, to forbid the application of the rules in the cases of cession to the renunciation of his claims made by his Britannic Majesty.

"If, by tracing the limits in the treaty by which the boundaries of the United States were attempted to be defined, England ceded to them the territory on the one side of the line, the possessions of Great Britain on the other side must be considered as held under a cession from the United States. On these provinces, indeed, the independent States of America had more or less pretensions, at different times during the war; and they were also entitled to prefer claims to a portion of them, founded on their being an acquisition from France at the time they formed an integral part of the empire.

"There is, however, nothing in a treaty of partition or boundaries, that conflicts with the idea of a perfect equality between the contracting parties. For

the purpose of preventing all future disputes, the avowed object of the second article of the Treaty of 1783, such conventions are frequently entered into between two nations of the same antiquity. And it is believed that the exposition which has been given, is sufficient to show that the character of the right which the United States are entitled to advance, under the Treaty of 1783, does not imply any 'admission of the previous title of Great Britain to the territory in question,' considered distinct from that of Massachusetts." Mr. Lawrence, Chargé d'Affaires, to the Earl of Aberdeen, August 22, 1828. Cong. Doc. H. R. 20 Cong. 2d Sess. No. 90, p. 76. Amer. Annual Register, 1827–8–9, Part II. p. 86.]

PAGE 78, NOTE *b*.

[It would seem from a debate in the House of Commons that, in 1850, as well as subsequently, negotiations were carried on, by the order of his government, direct, between the British Consul at Charleston and the State authorities of South Carolina, for a modification, so far as it affected English subjects, of a local act, prohibiting free negroes and other persons of color, from entering that State. The law, it was admitted by the Secretary for Foreign Affairs, was not an infraction of the commercial convention of 1815; the rights and privileges which it guarantees being "subject always to the laws and statutes of the two countries respectively." See Convention July 3, 1815. U. S. Statutes at Large, vol. viii. p. 228. The reason stated for attempting to transfer the negotiations from the Federal to the State government was, that the American Secretary of State had intimated that, if England persisted in demanding the concession, the only course for the United States to adopt would be, to give the notice required for terminating the convention. London Times, June, 1853.]

PAGE clxxv., 88, NOTE *a*, (CONTINUED.)

[The following official papers will elucidate the policy which, from an early day, has been pursued by the United States in reference to Cuba, as well as explain the grounds on which, on account of its peculiar position, their right to interpose, with regard to the political condition of that island, is based. In the instructions given during the administration of President Monroe, by Mr. Adams, Secretary of State, to Mr. Nelson, appointed Minister to Spain, dated April 23, 1823, it was said: —

"Hitherto the wishes of this government have been, that the connection between Cuba and Spain should continue as it has existed for several years; these wishes are known to the principal inhabitants of the island, and instructions, copies of which are now furnished you, were some months since transmitted to Mr. Forsyth, authorizing him in a suitable manner to communicate them to the Spanish government. These wishes still continue, so far as they can be indulged with a rational foresight of events beyond our control, but for which it is our duty to be prepared. If a government is to be imposed by foreign violence upon the Spanish nation, and the liberties which they have asserted by their constitution are to be crushed, it is neither to be expected nor desired that the people of Cuba, far from the reach of the oppressors of Spain, should submit to be governed by them. Should the cause of Spain herself issue more propitiously than from its present prospects can be anticipated, it is obvious that the trial through which she must

pass at home, and the final loss of *all* her dominions on the American continents, will leave her unable to extend to the island of Cuba that protection necessary for its internal security and its outward defence.

"Great Britain has formally withdrawn from the councils of the European alliance in regard to Spain; she disapproves the war which they have sanctioned, and which is undertaken by France; and she avows her determination to defend Portugal against the application of the principles upon which the invasion of Spain raises its only pretence of right. To the war, as it commences, she has declared her intention of remaining neutral; but the spirit of the British nation is so strongly and with so much unanimity pronounced against France, their interests are so deeply involved in the issue, their national resentments and jealousies will be so forcibly stimulated by the progress of the war, whatever it may be, that, unless the conflict should be as short and the issue as decisive as that of which Italy was recently the scene, it is scarcely possible that the neutrality of Great Britain should be long maintained. The prospect is that she will be soon engaged on the side of Spain; but, in making common cause with her, it is not to be supposed that she will yield her assistance upon principles altogether disinterested and gratuitous. As the price of her alliance, the two remaining islands of Spain in the West Indies present objects no longer of much possible value or benefit to Spain, but of such importance to Great Britain, that it is impossible to suppose her indifferent to the acquisition of them.

"The motives of Great Britain for desiring the possession of Cuba are so obvious, especially since the independence of Mexico and the annexation of the Floridas to our Union; the internal condition of the island since the recent Spanish Revolution, and the possibility of its continued dependence upon Spain have been so precarious; the want of protection there, the power of affording it possessed by Great Britain, and the necessities of Spain to secure, by some equivalent, the support of Great Britain for herself, have formed a remarkable concurrence of predispositions to the transfer of Cuba, and, during the last two years, rumors have been multiplied that it was already consummated. We have been confidentially told, by indirect communication from the French government, that more than two years since Great Britain was negotiating with Spain for the cession of Cuba, and, so eager in the pursuit, as to have offered Gibraltar and more for it in exchange. There is reason to believe that, in this respect, the French government was misinformed; but neither is entire reliance to be placed on the declaration lately made by the present British Secretary for Foreign Affairs to the French government, and which, with precautions indicating distrust, has been also confidentially communicated to us, namely, that Great Britain would hold it disgraceful to avail herself of the distressed situation of Spain to obtain possession of any portion of her American colonies. The object of this declaration, and of the communication of it here, undoubtedly was to induce the belief that Great Britain entertained no purpose of obtaining the possession of Cuba; but these assurances were given with reference to a state of peace then still existing, and which it was the intention and hope of Great Britain to preserve. The condition of all the parties to them has since changed; and however indisposed the British government might be ungenerously to avail themselves of the distress of Spain, to extort from her any remnant of her former possessions, they did not forbear to take advantage of it, by orders of reprisals given to two successive

squadrons despatched to the West Indies, and stationed in the immediate proximity to the island of Cuba. . . .

"The war between France and Spain changes so totally the circumstances under which the declaration above mentioned, of Mr. Canning, was made, that it may at its very outset produce events, under which the possession of Cuba may be obtained by Great Britain, without even raising a reproach of intended deception against the British government for making it. An alliance between Great Britain and Spain may be one of the first fruits of this war. A guarantee of the island to Spain may be among the stipulations of that alliance; and, in the event either of a threatened attack upon the island by France, or of attempts on the part of the islanders to assume their independence, a resort to the temporary occupation of the Havana by British forces may be among the probable expedients through which it may be obtained, by concert, between Great Britain and Spain herself. It is not necessary to point out the numerous contingencies by which the transition from a temporary and fiduciary occupation to a permanent and proprietary possession may be effected.

"The transfer of Cuba to Great Britain would be an event unpropitious to the interests of this Union. This opinion is so generally entertained, that even the groundless rumors that it was about to be accomplished, which have spread abroad and are still teeming, may be traced to the deep and almost universal feeling of aversion to it, and to the alarm which the mere probability of its occurrence has stimulated. The question, both of our right and of our power to prevent it, if necessary by force, already obtrudes itself upon our councils; and the administration is called upon, in the performance of its duties to the nation, at least to use all the means within its competency to guard against and forefend it."

Mr. Clay, Secretary of State under President Adams, in his instructions of April 25, 1825, to Mr. Everett, Minister at Madrid, says: —

"The United States are satisfied with the present condition of those islands (Cuba and Porto Rico) in the hands of Spain, and with their ports open to our commerce as they now are open; this government desires no political change of that condition. The population itself of the islands is incompetent, at present, from its composition and its amount, to maintain self-government. The maritime force of the neighboring republics of Mexico and Colombia is not now, nor is it likely shortly to be, adequate to the protection of those islands, if the conquest of them were effected. The United States would entertain constant apprehensions of their passing from their possession to that of some less friendly sovereignty; and, of all the European powers, this country prefers that Cuba and Porto Rico should remain dependent on Spain. If the war should continue between Spain and the new republics, and those islands should become the object and the theatre of it, their fortunes have such a connection with the prosperity of the United States, that they could not be indifferent spectators; and the possible contingencies of such a protracted war might bring upon the government of the United States duties and obligations, the performance of which, however painful it should be, they might not be at liberty to decline."

Mr. Clay also wrote to Mr. Everett, on the 13th of April, 1826, as follows: —

"On the twentieth day of last December, I addressed a note to each of the ministers from Colombia and Mexico, a copy of which is now forwarded, for the purpose of prevailing upon their respective governments to suspend any expedi-

tion which both or either of them might be fitting out against the islands of Cuba and Porto Rico. The President considered the suspension might have a favorable effect upon the cause of peace, and it was also recommended by other considerations. We have not yet been officially informed of the result of the application; but it was made under auspicious circumstances, and there is reason to believe that it will be attended with the desired effect. You will avail yourself of this measure to impress upon Spain the propriety of putting an end to the war, and urge it as a new proof of the friendly dispositions of this government. In respect to Cuba and Porto Rico, there can be little doubt, if the war were once ended, that they would be safe in the possession of Spain; they would, at least, be secure from foreign attacks, and all ideas of independence which the inhabitants may entertain, would cease with the cessation of the state of war which has excited them. Great Britain is fully aware that the United States could not consent to her occupation of those islands under any contingencies whatever. France, as you will see by the annexed correspondence with Mr. Brown and with the French government, also well knows that we could not see with indifference her acquisition of those islands; and the forbearance of the United States in regard to them may be fully relied on, from their known justice, from their patience and moderation heretofore exhibited, and from their established pacific policy. If the acquisition of Cuba were desirable to the United States, there is believed to be no reasonable prospect of effecting, at this conjuncture, that object; and, if there were any, the frankness of their diplomacy, which has induced the President freely and fully to disclose our views both to Great Britain and France, forbids absolutely any movement whatever at this time, with such a purpose. This condition of the great maritime powers (the United States, Great Britain, and France) is almost equivalent to an absolute guarantee of the islands to Spain; but we can enter into no stipulations by treaty to guarantee them, and the President, therefore, approves your having explicitly communicated to Spain that we could contract no engagement to guarantee them. You will continue to decline any proposal to that effect, should any such hereafter be made." Cong. Doc. 32 Cong. 1st Sess. No. 121, pp. 8, 10, 17, 18.

The despatch from Mr. Gallatin, Minister at London, to Mr. Clay, dated December 22, 1826, and of which the following is an extract, as well as a subsequent one from Mr. Everett, alludes to a supposed attempt of England to possess herself of Cuba: —

"After Mr. Canning had concluded what he had to say, and from which his extreme desire that peace might be preserved was evident, I told him that, satisfactory as the view of the British government in that respect appeared to me, yet it was by no means certain that actual war between England and Spain would be avoided, and I must call his attention to the consequences such an event might have on the relations of the United States and Great Britain. That was the object of the interview I had asked.

"It was, I said, understood between Great Britain and the United States, that Cuba should not fall into the hands of either. I did not suspect that even the right, which a state of war generally gives to attack the enemy anywhere, would make any change in that respect, and that it would be the intention of England to attack the remaining Spanish colonies. 'We have already too many,' was Mr. Canning's observation. Yet, when I proceeded to say that it

would be satisfactory to have positive assurances to that effect, I received no answer. This induced me to enter more at large on the subject, and to try to impress strongly on his mind that it was impossible that the United States could acquiesce in the conquest by, or transfer of that island to, any great maritime power; and that the new American States, particularly Mexico, would be equally averse to it. All this was expressed in strong but general terms, and as if I took it for granted that England had no such object in view for herself, and was disposed to act in concert with us. On that account, I added that, in the state of dissolution where Spain was, and considering the continuing war between her and the new American States, it might be proper to consider whether it was practicable to keep Cuba much longer in that state which we had heretofore considered as the most desirable to England and to us. If not, the question would be, whether the island should be attached to Mexico or Colombia, or whether the white population was strong enough to maintain independence without danger from the blacks. Although I could draw no assurance respecting the views of Great Britain, as to herself, Mr. Canning said that the subject was worthy of great consideration, and that he certainly would attend to it. His reluctance to speak more decisively must, perhaps, be ascribed partly to his usual caution, partly to some recollection of what had passed between him and Mr. King, in regard to that island. I must add, that I have no positive information of the presumed understanding, to which I alluded as existing between the two countries on that subject; and that a report in circulation and communicated to me, that there was an intention, on the part of England, to occupy Cuba, though probably without foundation, was one of my inducements to speak thus early on that subject."

Again Mr. Gallatin writes to the Secretary of State, on the 30th of the same month: —

"Reports of an intention, on the part of this government, to attack Cuba, are still in circulation; more indicative, I think, of popular feeling, than of the views of the ministry. Yet, and notwithstanding his habitual reserve, there was no reason why Mr. Canning should not, in our conversation, have most especially disavowed any such intention. . . .

"You will see by to-day's papers that Chateaubriand, in his speech to the House of Peers, said, 'that England could not take Cuba without making war on the United States, and that she knew it.' This I had told him when he was Minister,[1] and included France in the declaration. You renewed the declaration in a more official shape to his successor." MS. Despatches.

A despatch dated Madrid, August 17, 1827, from Mr. Everett to the Secretary of State, says: —

"The inclosed copy of a confidential despatch, addressed to the Minister of State by the Conde de la Alcudia, Spanish Minister at London, was handed me to-day, by a private friend, and may be depended on as authentic. As the communication was made to me in the strictest confidence, and as the document is in itself unsuitable for the press, I take the liberty of transmitting it to you —

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[1] Mr. Gallatin was then Minister to France.

for the President's information — in the form of a private letter, and request that it may not be placed on the public files of the Department of State.

"In this letter the Spanish Minister informs his government of a plan conceived by that of England, and already in a state of partial execution, for effecting a revolution in the Canary Islands and in Cuba. The sources from which the Count de la Alcudia derived his knowledge upon the subject are, as you will perceive, of the most respectable character, and such as leave no doubt of the facts. The object seems to be, to establish the British influence in these islands; in the end, probably, to obtain territorial possession of them; and the cover of a spontaneous declaration of independence by the inhabitants is to be employed, in order, as is expressly stated, to avoid awakening the jealousy of the government of the United States."

The despatch of the Conde de la Alcudia, which bears date June 1st, 1827, after referring to the projected expedition, states that: —

"The whole operation has been undertaken, and is to be conducted in concert with the revolutionists resident here (at London) and in the islands, who have designated a Spanish general, now at this place, to take the command of the Havana, when the occasion shall require it.

"The Duke of Wellington communicated to me the above information, which is also confirmed by an intimation which he gave to Brigadier-General Don Francisco Armentecos, when this officer took leave of him to go to the Havana. The Duke then advised him, if he should discover any symptoms of disaffection in the authorities, to give immediate notice to the king, as it would be a grievous thing for his Majesty to lose the Havana."

Mr. Van Buren, Secretary of State in the administration of President Jackson, thus instructed, October 2, 1829, the Minister to Spain, Mr. Van Ness: —

"One of the considerations which the Ministers of the United States who preceded you at the court of his Catholic Majesty were advised to press upon his government, as an inducement for him to terminate the contest with his late colonies, is the preservation of his insular possessions in the West Indies, which still constitute a part of the Spanish monarchy. Cuba and Porto Rico, occupying, as they do, a most important geographical position, have been viewed by the neighboring States of Mexico and Colombia as military and naval arsenals, which would at all times furnish Spain with the means of threatening their commerce, and even of endangering their political existence. Looking with a jealous eye upon these last remnants of Spanish power in America, these two States had once united their forces; and their arm, raised to strike a blow which, if successful, would forever have extinguished Spanish influence in that quarter of the globe, was arrested chiefly by the timely interposition of this government, which, in a friendly spirit towards Spain, and for the interests of general commerce, thus assisted in preserving to his Catholic Majesty these invaluable portions of his colonial possessions. . . .

"It had been intimated, at one time, that the armed interference of France in the affairs of that country would extend over her insular possessions, and that a military occupation of Cuba was to take place, for the alleged purpose of protecting it against foreign invasion or internal revolutionary movements. A similar design was imputed to the government of Great Britain; and it was stated that, in both cases, a continuance of the occupation of the island was to constitute,

in the hands of either of those powers, a guarantee for the payment of heavy indemnities claimed by France, on the one hand, to cover the expenses of her armies of occupation; and by Great Britain, on the other, to compensate her subjects for spoliations alleged to have been committed upon their commerce. The arrangements entered into by Spain with those two powers, by means of treaties of a recent date, and providing for the payment of those indemnities, although removing the pretext upon which the occupation of Cuba would have been justified, are not believed entirely to obviate the possibility of its eventually being effected. The government of the United States considers as a much stronger pledge of its continuance under the dominion of Spain the considerable military and naval armaments which have recently been added to the ordinary means of defence in that island, and which are supposed fully adequate for its protection against any attempt on the part of foreign powers, and for the suppression of any insurrectionary movement on that of its inhabitants. Notwithstanding these apparent securities for the maintenance of the Spanish authority in the island of Cuba, as it is not impossible that Spain, in her present embarrassed and dependent situation, might be induced to yield her assent to a temporary occupation of it, as a pledge for the fulfilment of her engagements, or to part with her right of property in it for other considerations, affording immediate relief in the hour of her distress, it is the wish of the President that the same watchfulness which had engaged the attention of your predecessors in relation to this subject, should be continued during your administration of the affairs of the legation of the United States at Madrid, and that you should take special care to keep this department informed of every occurrence whose tendency, direct or indirect, might, in your judgment, bring about any change in the present condition of the island of Cuba.

"Your predecessors, who had been repeatedly instructed to that effect, have availed themselves of every fit opportunity to make the wishes and policy of the United States, with regard to the Spanish islands, fully known to the government of his Catholic Majesty, whom you will find already possessed of every information which you will have it in your power to communicate upon this head; but it is not improbable that the same inquisitiveness which has hitherto been manifested on the part of that government, in relation to it, may again be evinced by the Spanish ministers, who, affecting to construe the avowed anxiousness of the United States into a determination not to suffer the possession of Cuba to pass into the hands of other powers, have inquired how far this government would go in sustaining that determination. Should similar inquiries be made of you by the Ministers of his Catholic Majesty, you are authorized to say that the long-established and well-known policy of the United States, which forbids their entangling themselves in the concerns of other nations, and which permits their physical force to be used only for the defence of their political rights and the protection of the persons and property of their citizens, equally forbids their public agents to enter into positive engagements, the performance of which would require the employment of means which the people have retained in their own hands; but that this government has every reason to believe that the same influence which once averted the blow ready to fall upon the Spanish islands would again be found effectual on the recurrence of similar events; and that the high preponderance in American affairs of the United States as a great naval power, the

influence which they must at all times command as a great commercial nation, in all questions involving the interests of the general commerce of this hemisphere, would render their consent an essential preliminary to the execution of any project calculated so vitally to affect the general concerns of all the nations in any degree engaged in the commerce of America."

In consequence of a report that a proposition for a loan had been made by Spain, connected with a guarantee of Cuba and Porto Rico by England and France, Mr. Stevenson, Minister at London, writes, June 16, 1837, that he had asked an interview of Lord Palmerston. In his statement of the conference he says: —

"Under such circumstances, I felt justified in saying frankly to his lordship, that it was impossible that the United States could acquiesce in the *transfer of Cuba from the dominion of Spain to any of the great maritime powers of Europe;* that of the right of the United States to interfere, in relation to these islands, I presumed there could be little doubt; that whilst the general rule of international law, which forbids the interference of one State in the affairs of another, was freely admitted, there were yet *exceptions to the rule, in relation to the laws of defence and self-preservtion*, which all nations acknowledged, and that the present was precisely such a case; that in this view, and with a sincere desire to guard against possible difficulties, I deemed it proper to say what I had, and hoped his lordship would receive it in the spirit in which it was offered."

Mr. Forsyth, Secretary of State under President Van Buren, gave, July 15, 1840, the following instructions to Mr. Vail, Chargé d'Affaires at Madrid: —

"Should you have reason to suspect any design on the part of Spain to transfer voluntarily her title to the island, whether of ownership or possession, and whether permanent or temporary, to Great Britain or any other power, you will distinctly state that the United States will prevent it all hazards, as they will any foreign military occupation, for any pretext whatsoever. And you are authorized to assure the Spanish government, that in case of any attempt, from whatever quarter, to wrest from her this portion of her territory, she may securely depend upon the military and naval resources of the United States to aid her in preserving or recovering it. It is believed that the means of preventing such an attempt, or of disconcerting all designs that may lead to it, lie within the reach of the Spanish government; the readiest which occurs to us is, to deprive England of all real motive, and even of the remotest pretence, for interference on her part in the affairs of Cuba, by a scrupulous performance of all the obligations Spain may have contracted towards her, either of a pecuniary character, or as connected with the existing agreements between the two nations in relation to the slave-trade. No proper opportunity of which you can avail yourself, without incurring the risk of being thought officious, should be allowed to escape you, to let the Spanish government be fully informed of the views we entertain with regard to the island, as set forth in these instructions, and in the others on file in the legation. And you will hold yourself in readiness, should the occasion arise, formally to protest, in the name of your government, against any act, whether of Spain herself or of any other power, likely to lead to a transfer of her territorial right to the island of Cuba, or to the military occupation of it by the forces of any other nation."

Mr. Webster, Secretary of State under President Tyler, in a despatch to the

Consul at Havana, dated January 14, 1843, and a copy of which was transmitted to Mr. Irving, Minister at Madrid, says : —

" The Spanish government has long been in possession of the policy and wishes of this government in regard to Cuba, which have never changed, and has been repeatedly told that the United States never would permit the occupation of that island by British agents or forces, upon any pretext whatsoever ; and that, in the event of any attempt to wrest it from her, she might securely rely upon the whole naval and military resources of this country, to aid her in preserving or recovering it."

Mr. Upshur, his successor, thus instructs Mr. Irving, on the 9th of January, 1844 : —

" The delicate nature of our relations with Spain in regard to the island of Cuba, taken in connection with the supposed designs of another power upon that territory, renders it necessary that this government should exercise a sleepless vigilance, in watching over the rights of Spain in that quarter, in a matter that so nearly concerns her own interests and security. You will, therefore, lose no time in endeavoring to ascertain the present views and feelings of the Spanish government upon this important point, and communicate to your own all the information you can obtain in regard to it. It is necessary that Spain should be duly impressed with the importance of such a crisis as late events have led this government to apprehend as altogether probable and near at hand, and it is still more necessary that this government should be prepared to act, with a perfect understanding of the whole subject, with reference to its own safety and interests. In the event that Spain shall so far yield to the pressure upon her, as to concede to Great Britain any control over Cuba, the fact will necessarily have an important influence over the policy of this government. It is difficult to give you any positive instructions upon this subject; and you are, therefore, left to your own discretion, as to what you shall say and to whom. It may be advisable to confer confidentially with some of the friends of the Chevalier D'Argaiz, who are represented to have influence, and to whom, therefore, it may be politic to impart the feelings and wishes of this government on the occasion. My only object is to obtain full and accurate information in regard to every movement which England may make with reference to Cuba, whether designed to obtain a transfer of that island to herself, or to obtain a control over the policy of Spain in regard to it, or to affect the institution of African slavery now existing there. The modes in which you may acquire this information are submitted to your discretion."

In the administration of President Polk, the following instructions were given by the Secretary of State, Mr. Buchanan, dated June 17, 1848, to Mr. Saunders, Minister at Madrid : —

" By direction of the President, I now call your attention to the present condition and future prospects of Cuba. The fate of this island must ever be deeply interesting to the people of the United States. We are content that it shall continue to be a colony of Spain. Whilst in her possession, we have nothing to apprehend. Besides, we are bound to her by the ties of ancient friendship, and we sincerely desire to render these perpetual.

" But we can never consent that this island shall become a colony of any other European power. In the possession of Great Britain, or any strong naval power, it might prove ruinous both to our domestic and foreign commerce, and even

endanger the union of the States. The highest and first duty of every independent nation is to provide for its own safety; and, acting upon this principle, we should be compelled to resist the acquisition of Cuba by any powerful maritime State, with all the means which Providence has placed at our command.

"Cuba is almost within sight of the coast of Florida, situated between that State and the peninsula of Yucatan, and possessing the deep, capacious, and impregnably fortified harbor of the Havana. If this island were under the dominion of Great Britain, she could command both the inlets to the Gulf of Mexico. She would thus be enabled, in time of war, effectively to blockade the mouth of the Mississippi, and to deprive all the western States of this Union, as well as those within the Gulf, teeming as they are with an industrious and enterprising population, of a foreign market for their immense productions. But this is not the worst. She could also destroy the commerce by sea between our ports on the Gulf and our Atlantic ports, a commerce of nearly as great a value as the whole of our foreign trade. Is there any reason to believe that Great Britain desires to acquire the island of Cuba? We know that it has been her uniform policy, throughout her past history, to seize upon every valuable commercial point throughout the world, whenever circumstances have placed this in her power. And what point so valuable as the island of Cuba?

"The United States are the chief commercial rival of Great Britain; our tonnage, at the present moment, is nearly equal to hers; and it will be greater within a brief period, if nothing should occur to arrest our progress. Of what vast importance would it, then, be to her to obtain the possession of an island, from which she could at any time destroy a very large portion both of our foreign and coasting trade? Besides she well knows that if Cuba were in our possession, her West India Islands would be rendered comparatively valueless. From the extent and fertility of this island, and from the energy and industry of our people, we should soon be able to supply the markets of the world with tropical productions, at a cheaper rate than these could be raised in any of her possessions. . . .

"But let me present another view of the subject. If Cuba were annexed to the United States, we should not only be relieved from the apprehensions which we can never cease to feel for our own safety and the security of our commerce, whilst it shall remain in its present condition, but human foresight cannot anticipate the beneficial consequences which would result to every portion of our Union.

"This can never become a local question. With suitable fortifications at the Tortugas, and in possession of the strongly fortified harbor of Havana as a naval station on the opposite coast of Cuba, we could command the outlet of the Gulf of Mexico, between the peninsula of Florida and that island. This would afford ample security both to the foreign and coasting trade of the western and southern States, which seek a market for their surplus productions through the ports on the Gulf.

"Under the government of the United States, Cuba would become the richest and most fertile island, of the same extent, throughout the world. . . .

"Mr. McGregor states the aggregate population of Cuba, in the year 1841, to have been only 1,007,624; but, from the data which have just been presented, it may fairly be inferred that the island is capable of sustaining in comfort a popu-

lation of ten millions of inhabitants. Were Cuba a portion of the United States, it would be difficult to estimate the amount of bread-stuffs, rice, cotton, and other agricultural as well as manufacturing and mechanical productions; of lumber, of the produce of our fisheries, and of other articles which would find a market in that island, in exchange for their coffee, sugar, tobacco, and other productions. This would go on increasing with the increase of its population and the development of its resources, and all portions of the Union would be benefited by the trade.

"Desirable, however, as the possession of this island may be to the United States, we would not acquire it except by the free will of Spain. Any acquisition, not sanctioned by justice and honor, would be too dearly purchased. While such is the determination of the President, it is supposed that the present relations between Cuba and Spain might incline the Spanish government to cede the island to the United States, upon the payment of a fair and full consideration. We have received information from various sources, both official and unofficial, that among the creoles of Cuba there has long existed a deep-rooted hostility to Spanish dominion. The revolutions which are rapidly succeeding each other throughout the world have inspired the Cubans with an ardent and irrepressible desire to achieve their independence. Indeed we are informed, by the Consul of the United States at the Havana, that 'there appears every probability that the island will soon be in a state of civil war.' He also states, that 'efforts are now being made to raise money for that purpose in the United States, and there will be attempts to induce a few of the volunteer regiments now in Mexico to obtain their discharge and join in the revolution.'

"I need scarcely inform you that the government of the United States has had no agency whatever in exciting the spirit of disaffection among the Cubans. Very far from it. A short time after we received this information from our Consul, I addressed a despatch to him, of which I transmit you a copy, dated on the 9th instant, from which you will perceive that I have warned him to keep a watchful guard both upon his words and actions, so as to avoid even the least suspicion that he had encouraged the Cubans to rise in insurrection against the Spanish government. I stated also that the relations between Spain and the United States had long been of the most friendly character, and both honor and duty required that we should take no part in the struggle which he seemed to think was impending. I informed him that it would certainly become the duty of this government to use all proper means to prevent any of our volunteer regiments now in Mexico from violating the neutrality of the country, by joining in the proposed civil war of the Cubans against Spain. Since the date of my despatch to him, this duty has been performed. The Secretary of War, by command of the President, on the day following, (June 10,) addressed an order to our commanding-general in Mexico, and also to the officer having charge of the embarkation of our troops at Vera Cruz, (of which I transmit you a copy,) directing each of them to use all proper measures to counteract any such plan, if one should be on foot, and instructing them 'to give orders that the transports on which the troops may embark proceed directly to the United States, and in no event to touch at any place in Cuba.' The Consul, in his despatch to me, also stated that, if the revolution is attempted and succeeds, immediatiate application would be made to the United States for annexation; but he did not seem to

think that it would be successful, and, probably, would not be undertaken without the aid of American troops. To this portion of the despatch I replied — knowing the ardent desire of the Cubans to be annexed to our Union — that I thought it would not be 'difficult to predict that an unsuccessful rising would delay, if it should not defeat, the annexation of the island to the United States,' and I assured him that the aid of our volunteer troops could not be obtained.

"Thus you will perceive with what scrupulous fidelity we have performed the duties of neutrality and friendship towards Spain. It is our anxious hope that a rising may not be attempted in Cuba; but if this should unfortunately occur, the government of the United States will have performed their whole duty towards a friendly power.

"Should the government of Spain feel disposed to part with the island of Cuba, the question, What should we offer for it? would then arise. . . .

"Upon the whole, the President would not hesitate to stipulate for the payment of ——, in convenient instalments, for a cession of the island of Cuba, if it could not be procured for a less sum.

"The apprehensions which existed for many years after the origin of this government, that the extension of our federal system would endanger the Union, seem to have passed away. Experience has proved that this system of confederated republics, under which the federal government has charge of interests common to the whole, whilst local governments watch over the concerns of the respective States, is capable of almost indefinite extension, with increasing strength. This, however, is always subject to the qualification, that the mass of the population must be of our own race, or must have been educated in the school of civil and religious liberty. With this qualification, the more we increase the number of confederated States, the greater will be the strength and security of the Union; because the more dependent for their mutual interests will the several parts be upon the whole, and the whole upon the several parts. It is true that, of the 418,291 white inhabitants which Cuba contained in 1841, a very large proportion is of the Spanish race; still, many of our citizens have settled on the island, and some of them are large holders of property. Under our government it would speedily be *Americanized*, as Louisiana has been. Within the boundaries of such a federal system alone can a trade exempt from duties and absolutely free be enjoyed. With the possession of Cuba, we should have throughout the Union a free trade on a more extended scale than any which the world has ever witnessed, arousing an energy and activity of competition, which would result in a most rapid improvement in all that contributes to the welfare and happiness of the human race. What State would forego the advantages of this vast free trade with all her sisters, and place herself in lonely isolation? But the acquisition of Cuba would greatly strengthen our bond of union. Its possession would secure to all the States within the valley of the Mississippi and Gulf of Mexico free access to the ocean; but this security could only be preserved whilst the ship-building and navigating States of the Atlantic shall furnish a navy sufficient to keep open the outlets from the Gulf to the ocean. Cuba, justly appreciating the advantages of annexation, is now ready to rush into our arms. Once admitted, she would be entirely dependent for her prosperity, and even existence, upon her connection with the Union, whilst the

rapidly increasing trade between her and the other States would shed its blessings and its benefits over the whole. Such a state of mutual dependence, resulting from the very nature of things, the world has never witnessed. This is what will insure the perpetuity of our Union.

"With all these considerations in view, the President believes that the crisis has arrived when an effort should be made to purchase the island of Cuba from Spain, and he has determined to intrust you with the performance of this most delicate and important duty. The attempt should be made, in the first instance, in a confidential conversation with the Spanish Minister for Foreign Affairs; a written offer might produce an absolute refusal in writing, which would embarrass us hereafter in the acquisition of the island. Besides, from the incessant changes in the Spanish cabinet and policy, our desire to make the purchase might thus be made known in an official form to foreign governments, and arouse their jealousy and active opposition. Indeed, even if the present cabinet should think favorably of the proposition, they might be greatly embarrassed by having it placed on record; for, in that event, it would almost certainly, through some channel, reach the opposition, and become the subject of discussion in the Cortes. Such delicate negotiations, at least in their incipient stages, ought always to be conducted in confidential conversation, and with the utmost secresy and despatch.

"At your interview with the Minister for Foreign Affairs, you might introduce the subject by referring to the present distracted condition of Cuba, and the danger which exists that the population will make an attempt to accomplish a revolution. This must be well known to the Spanish government. In order to convince him of the good faith and friendship towards Spain with which this government has acted, you might read to him the first part of my despatch to General Campbell, and the order issued by the Secretary of War to the commanding general in Mexico, and to the officer having charge of the embarkation of our troops at Vera Cruz. You may then touch delicately upon the danger that Spain may lose Cuba by a revolution in the island, or that it may be wrested from her by Great Britain, should a rupture take place between the two countries, arising out of the dismissal of Sir Henry Bulwer, and be retained to pay the Spanish debt due to the British bond-holders. You might assure him that, whilst this government is entirely satisfied that Cuba shall remain under the dominion of Spain, we should in any event resist its acquisition by any other nation. And, finally, you might inform him that, under all these circumstances, the President had arrived at the conclusion that Spain might be willing to transfer the island to the United States for a fair and full consideration. You might cite as a precedent the cession of Louisiana to this country by Napoleon, under somewhat similar circumstances, when he was at the zenith of his power and glory. I have merely presented these topics in their natural order, and you can fill up the outline from the information communicated in this despatch, as well as from your own knowledge of the subject. Should the Minister for Foreign Affairs lend a favorable ear to your proposition, then the question of the consideration to be paid would arise, and you have been furnished with information in this despatch which will enable you to discuss that question. In justice to Mr. Calderon I ought here to observe, that whilst giving me the information before stated, in regard to the net amount of revenue from Cuba which reached Old Spain, he

had not then, and has not now, the most remote idea of our intention to make an attempt to purchase the island.

"The President would be willing to stipulate for the payment of one hundred millions of dollars. This, however, is the maximum price; and if Spain should be willing to sell, you will use your best efforts to purchase it at a rate as much below that sum as practicable. In case you should be able to conclude a treaty, you may adopt, as your model, so far as the same may be applicable, the two conventions of April 30, 1803, between France and the United States, for the sale and purchase of Louisiana. The seventh and eighth articles of the first of these conventions ought, if possible, to be omitted; still, if this should be indispensable to the accomplishment of the object, articles similar to them may be retained.

"I transmit you a full power to conclude such a treaty." Cong. Doc. *ut supra.*

The notes which passed between the American Secretary of State and the British and French Ministers, in relation to a tripartite treaty with regard to Cuba, the original proposition for which was made in 1851, as well as Secretary Marcy's despatch to Mr. Buchanan, at London, on the subject, have been inserted elsewhere. In the summer of 1854 a conference was held, by the Ministers of the United States accredited at Madrid, London and Paris, with a view to consult on the negotiations which it might be advisable to carry on, simultaneously, at those several courts, for the satisfactory adjustment with Spain of the affairs connected with that island.

The result of the deliberations of these Ministers is given in the following joint despatch, dated October 18, 1854, and addressed to the Secretary of State: —

"Aix-La-Chapelle, *October* 18, 1854.

"Sir — The undersigned, in compliance with the wish expressed by the President, in the several confidential despatches you have addressed to us, respectively, to that effect, have met in conference, first at Ostend, in Belgium, on the 9th, 10th, and 11th instant, and then at Aix-la-Chapelle, in Prussia, on the days next following, up to the date hereof.

"There has been a full and unreserved interchange of views and sentiments between us, which we are most happy to inform you has resulted in a cordial coincidence of opinion on the grave and important subjects submitted to our consideration.

"We have arrived at the conclusion, and are thoroughly convinced, that an immediate and earnest effort ought to be made by the government of the United States, to purchase Cuba from Spain, at any price for which it can be obtained, not exceeding the sum of $.

"The proposal should, in our opinion, be made in such a manner as to be presented through the necessary diplomatic forms, to the Supreme Constituent Cortes about to assemble. On this momentous question, in which the people both of Spain and the United States are so deeply interested, all our proceedings ought to be open, frank, and public. They should be of such a character as to challenge the approbation of the world.

"We firmly believe that, in the progress of human events, the time has arrived when the vital interests of Spain are as seriously involved in the sale, as those of

the United States in the purchase of the island, and that the transaction will prove equally honorable to both nations.

"Under these circumstances we cannot anticipate a failure, unless, possibly, through the malign influence of foreign powers, who possess no right whatever to interfere in the matter.

"We proceed to state some of the reasons which have brought us to this conclusion, and, for the sake of clearness, we shall specify them under two distinct heads:

"1. The United States ought, if practicable, to purchase Cuba with as little delay as possible.

"2. The probability is great that the government and Cortes of Spain will prove willing to sell it, because this would essentially promote the highest and best interests of the Spanish people.

"Then, 1. It must be clear to every reflecting mind that, from the peculiarity of its geographical position and the considerations attendant on it, Cuba is as necessary to the North American Republic as any of its present members, and that it belongs naturally to that great family of States of which the Union is the providential nursery.

"From its locality it commands the mouth of the Mississippi, and the immense and annually increasing trade which must seek this avenue to the ocean.

"On the numerous navigable streams, measuring an aggregate course of some thirty thousand miles, which disembogue themselves through this magnificent river into the Gulf of Mexico, the increase of the population, within the last ten years, amounts to more than that of the entire Union at the time Louisiana was annexed to it.

"The natural and main outlet to the products of this entire population, the highway of their direct intercourse with the Atlantic and the Pacific States, can never be secure, but must ever be endangered, whilst Cuba is a dependency of a distant power, in whose possession it has proved to be a source of constant annoyance and embarrassment to their interests.

"Indeed the Union can never enjoy repose, nor possess reliable security, as long as Cuba is not embraced within its boundaries.

"Its immediate acquisition by our government is of paramount importance, and we cannot doubt but that it is a consummation devoutly wished for by its inhabitants.

"The intercourse, which its proximity to our coasts begets and encourages between them and the citizens of the United States, has, in the progress of time, so united their interests and blended their fortunes, that they now look upon each other as if they were one people and had but one destiny.

"Considerations exist, which render delay in the acquisition of this island exceedingly dangerous to the United States.

"The system of immigration and labor lately organized within its limits, and the tyranny and oppression which characterize its immediate rulers, threaten an insurrection at every moment, which may result in direful consequences to the American people.

"Cuba has thus become to us an unceasing danger, and a permanent cause of anxiety and alarm.

"But we need not enlarge on these topics. It can scarcely be apprehended that foreign powers, in violation of international law, would interpose their influence with Spain, to prevent our acquisition of the island. Its inhabitants are now suffering under the worst of all possible governments, that of absolute despotism, delegated by a distant power to irresponsible agents, who are changed at short intervals, and who are tempted to improve the brief opportunity thus afforded to accumulate fortunes by the basest means.

"As long as this system shall endure, humanity may in vain demand the suppression of the African slave-trade in the island. This is rendered impossible, whilst that infamous traffic remains an irresistible temptation and a source of immense profit to needy and avaricious officials, who, to attain their ends, scruple not to trample the most sacred principles under foot.

"The Spanish government at home may be well disposed, but experience has proved that it cannot control these remote depositaries of its power.

"Besides, the commercial nations of the world cannot fail to perceive and appreciate the great advantages which would result to their people from a dissolution of the forced and unnatural connection between Spain and Cuba, and the annexation of the latter to the United States. The trade of England and France with Cuba would, in that event, assume at once an important and profitable character, and rapidly extend with the increasing population and prosperity of the island.

"2. But if the United States and every commercial nation would be benefited by this transfer, the interests of Spain would also be greatly and essentially promoted.

"She cannot but see what such a sum of money as we are willing to pay for the island would effect, in the development of her vast natural resources.

"Two thirds of this sum, if employed in the construction of a system of railroads, would ultimately prove a source of greater wealth to the Spanish people, than that opened to their vision by Cortez. Their prosperity would date from the ratification of the treaty of cession.

"France has already constructed continuous lines of railways from Havre, Marseilles, Valenciennes, and Strasbourg, *via* Paris, to the Spanish frontier, and anxiously awaits the day when Spain shall find herself in a condition to extend these roads through her northern provinces, to Madrid, Seville, Cadiz, Malaga, and the frontiers of Portugal.

"This object once accomplished, Spain would become a centre of attraction for the travelling world, and secure a permanent and profitable market for her various productions. Her fields, under the stimulus given to industry by remunerating prices, would teem with cereal grain, and her vineyards would bring forth a vastly increased quantity of choice wines. Spain would speedily become what a bountiful Providence intended she should be, one of the first nations of continental Europe — rich, powerful, and contented.

"Whilst two thirds of the price of the island would be ample for the completion of her most important public improvements, she might, with the remaining forty millions, satisfy the demands now pressing so heavily upon her credit, and create a sinking fund which would gradually relieve her from the overwhelming debt now paralyzing her energies.

"Such is her present wretched financial condition, that her best bonds are sold

upon her own Bourse, at about one third of their par value; whilst another class, on which she pays no interest, have but a nominal value, and are quoted at about one sixth of the amount for which they were issued. Besides, these latter are held principally by British creditors, who may, from day to day, obtain the effective interposition of their own government for the purpose of coercing payment. Intimations to that effect have been already thrown out from high quarters; and unless some new source of revenue shall enable Spain to provide for such exigencies, it is not improbable that they may be realized.

"Should Spain reject the present golden opportunity for developing her resources, and removing her financial embarrassments, it may never again return.

"Cuba, in its palmiest days, never yielded her exchequer, after deducting the expenses of its government, a clear annual income of more than a million and a half of dollars. These expenses have increased to such a degree as to leave a deficit, chargeable on the treasury of Spain, to the amount of six hundred thousand dollars.

"In a pecuniary point of view, therefore, the island is an incumbrance, instead of a source of profit, to the mother country.

"Under no probable circumstances can Cuba ever yield to Spain one per cent. on the large amount which the United States are willing to pay for its acquisition. But Spain is in imminent danger of losing Cuba without remuneration.

"Extreme oppression, it is now universally admitted, justifies any people in endeavoring to relieve themselves from the yoke of their oppressors. The sufferings which the corrupt, arbitrary, and unrelenting local administration necessarily entails upon the inhabitants of Cuba, cannot fail to stimulate and keep alive that spirit of resistance and revolution against Spain which has of late years been so often manifested. In this condition of affairs, it is vain to expect that the sympathies of the people of the United States will not be warmly enlisted in favor of their oppressed neighbors.

"We know that the President is justly inflexible in his determination to execute the neutrality laws; but should the Cubans themselves rise in revolt against the oppression which they suffer, no human power could prevent citizens of the United States, and liberal-minded men of other countries, from rushing to their assistance. Besides, the present is an age of adventure, in which restless and daring spirits abound in every portion of the world.

"It is not improbable, therefore, that Cuba may be wrested from Spain by a successful revolution; and, in that event, she will lose both the island and the price which we are now willing to pay for it — a price far beyond what was ever paid by one people to another for any province.

"It may also be remarked, that the settlement of this vexed question, by the cession of Cuba to the United States, would forever prevent the dangerous complications between nations to which it may otherwise give birth.

"It is certain that, should the Cubans themselves organize an insurrection against the Spanish government, and should other independent nations come to the aid of Spain in the contest, no human power could, in our opinion, prevent the people and government of the United States from taking part in such a civil war, in support of their neighbors and friends.

"But if Spain, dead to the voice of her own interest, and actuated by stubborn

pride and a false sense of honor, should refuse to sell Cuba to the United States, then the question will arise, What ought to be the course of the American government under such circumstances?

"Self-preservation is the first law of nature, with States as well as with individuals. All nations have, at different periods, acted upon this maxim. Although it has been made the pretext for committing flagrant injustice, as in the partition of Poland and other similar cases which history records, yet the principle itself, though often abused, has always been recognized.

"The United States have never acquired a foot of territory except by fair purchase, or, as in the case of Texas, upon the free and voluntary application of the people of that independent State, who desired to blend their destinies with our own.

"Even our acquisitions from Mexico are no exception to this rule; because, although we might have claimed them by the right of conquest in a just war, yet we purchased them for what was then considered by both parties a full and ample equivalent.

"Our past history forbids that we should acquire the island of Cuba without the consent of Spain, unless justified by the great law of self-preservation. We must, in any event, preserve our own conscious rectitude and our own self-respect.

"Whilst pursuing this course, we can afford to disregard the censures of the world, to which we have been so often and so unjustly exposed.

"After we shall have offered Spain a price for Cuba far beyond its present value, and this shall have been refused, it will then be time to consider the question, does Cuba, in the possession of Spain, seriously endanger our internal peace, and the existence of our cherished Union?

"Should this question be answered in the affirmative, then, by every law, human and divine, we shall be justified in wresting it from Spain, if we possess the power; and this upon the very same principle that would justify an individual in tearing down the burning house of his neighbor, if there were no other means of preventing the flames from destroying his own home.

"Under such circumstances, we ought neither to count the cost nor regard the odds which Spain might enlist against us. We forbear to enter into the question, whether the present condition of the island would justify such a measure? We should, however, be recreant to our duty, be unworthy of our gallant forefathers, and commit base treason against our posterity, should we permit Cuba to be Africanized, and become a second St. Domingo, with all its attendant horrors to the white race, and suffer the flames to extend to our own neighboring shores, seriously to endanger or actually to consume the fair fabric of our Union.

"We fear that the course and current of events are rapidly tending towards such a catastrophe. We, however, hope for the best, though we ought certainly to be prepared for the worst.

"We also forbear to investigate the present condition of the questions at issue between the United States and Spain. A long series of injuries to our people have been committed in Cuba, by Spanish officials, and are unredressed. But recently a most flagrant outrage on the rights of American citizens and on the flag of the United States, was perpetrated in the harbor of Havana, under circumstances

which, without immediate redress, would have justified a resort to measures of war, in vindication of national honor. That outrage is not only unatoned, but the Spanish government has deliberately sanctioned the acts of its subordinates, and assumed the responsibility attaching to them.

"Nothing could more impressively teach us the danger to which those peaceful relations it has ever been the policy of the United States to cherish with foreign nations, are constantly exposed, than the circumstances of that case. Situated as Spain and the United States are, the latter have forborne to resort to extreme measures.

"But this course cannot, with due regard to their own dignity as an independent nation, continue; and our recommendations, now submitted, are dictated by the firm belief that the cession of Cuba to the United States, with stipulations as beneficial to Spain as those suggested, is the only effective mode of settling all past differences, and of securing the two countries against future collisions.

"We have already witnessed the happy results for both countries, which followed a similar arrangement in regard to Florida.

"Yours, very respectfully,

"James Buchanan.
"J. Y. Mason.
"Pierre Soulé.

"Hon. William L. Marcy, Secretary of State."

Mr. Marcy thus refers to the above paper, in a despatch to Mr. Soulé, dated November 13, 1854: —

"The communication of the 18th ultimo, embodying the views of yourself, Mr. Buchanan, and Mr. Mason, upon our embarrassing relations with Spain, has been received and submitted to the President. He has given to that document the deliberate consideration, due alike to the importance of the subject therein discussed, and to the experience, wisdom, and ability of those whose opinions and suggestions it contains. When he first entered upon the duties of his present station, he found our intercourse with Spain much disturbed by the conduct of the Spanish authorities at Cuba. It has been his anxious desire, and the object of his strenuous efforts, to preserve peace and restore cordial good-will between that country and the United States. The source of our past difficulties with Spain, and of our apprehensions of future danger, is clearly disclosed in the report of yourself and associates. The measure therein presented — the purchase of Cuba — is probably the only one which would, with certainty, place the relations of the two countries on the sure basis of enduring friendship.

"While the island of Cuba remains a dependency of Spain, and the character of her rule over it is not changed, (and a change for the better can hardly be anticipated,) annoyances to our trade, and difficulties between our citizens and the local authorities, will be of frequent occurrence; and it is scarcely reasonable to expect that a peace thus rendered precarious will remain long unbroken. Conceiving that the transfer of Cuba to the United States, on the honorable conditions you have been instructed to offer, would be as important to her as to them, it was hoped that you would find her Catholic Majesty's government disposed to receive and discuss a proposition for that purpose. The President desires you to keep this important object of your mission in view,

and to enter upon negotiations in relation to it, whenever a favorable opportunity occurs.

"It is no longer, I believe, a secret in Spain, that the United States wish to obtain the cession, and that you have authority to treat on the subject. The knowledge of these facts will be likely to elicit opinions in regard to that measure, not only from the Ministers of her Catholic Majesty's government, but from other influential individuals of the nation. The Cortes will soon assemble, and that subject will undoubtedly be discussed by the members of that body in their social circles, if it does not become a subject of public deliberation. By a free and friendly intercourse among official and influential men, you will be enabled to determine the proper course to be pursued, in regard to opening a negotiation for the acquisition of Cuba.

"Should you find persons of position or influence disposed to converse on the subject, the considerations in favor of a cession are so many and so strong, that those who can be brought to listen would very likely become converts to the measure. But should you have reason to believe that the men in power are averse to entertaining such a proposition — that the offer of it would be offensive to the national pride of Spain, and that it would find no favor in any considerable class of the people — then it will be but too evident that the time for opening, or attempting to open, such a negotiation, has not arrived. It appears to the President that nothing could be gained, and something might be lost, by an attempt to push on a negotiation against such a general resistance. This view of the case is taken on the supposition, that you shall become convinced that a proposition for the cession of Cuba would certainly be rejected.

"The language of some part of the report might, perhaps, be so construed as to sustain the inference that you and your associates in the conference were of opinion that the proposition should be made, though there should be no chance of its being entertained, and that it should be accompanied with the open declaration or a significant suggestion that the United States were determined to have the island, and would obtain it by other means, if their present advances, so advantageous to Spain, be refused by her; but other parts of the report repel this inference. The remark in that document, that if Spain should refuse these proposals of the United States, then 'the question will arise, What ought to be the course of the American government under such circumstances?' clearly shows that it was not intended by yourself and colleagues to recommend to the President to offer to Spain the alternative of cession or seizure. The conclusion that the members of the conference were against such an alternative proposition, is also drawn from the following passage: — 'After we shall have offered Spain a price for Cuba far beyond its present value, and this shall have been refused, it will then be time to consider the question, Does Cuba, in the possession of Spain, seriously endanger our internal peace, and the existence of our cherished Union?' The President concurs in this view of the subject. But to conclude that, on the rejection of a proposition to cede, seizure should ensue, would be to assume that self-preservation necessitates the acquisition of Cuba by the United States; that Spain has refused, and will persist in refusing, our reclamations for injuries and wrongs inflicted, and that she will make no arrangement for our future security against the recurrence of similar injuries and wrongs.

"As to the first consideration, I will only remark, that the acquisition of Cuba

by the United States would be preëminently advantageous in itself, and of the highest importance as a precautionary measure of security. However much we might regret the want of success in our efforts to obtain the cession of it, that failure would not, without a material change in the condition of the island, involve imminent peril to the existence of our government. But should the contingency suggested in your report ever arise, there is no reason to doubt that the case will be promptly met by the deliberate judgment and decisive action of the American people.

"In relation to outrages and injuries, this government have good grounds to complain of the course hitherto pursued by Spain; and, should that course be persisted in, it would be justified in resorting to coercive means to obtain redress; but the aspect of this branch of the subject has, however, lately somewhat changed. The present cabinet of Spain has indicated a more favorable disposition, in regard to demands for satisfaction and indemnity, than that which preceded it. . . . . .

"Should the government of Spain recede from the grounds taken in Mr. Calderon's note to you of the 7th of May last, disapprove of the conduct of her authorities at Havana in the case of the Black Warrior, disavow their acts, show in an appropriate manner its displeasure towards them on that account, and offer full indemnity for the losses and injuries which our citizens sustained in that affair, you will entertain these propositions, and signify the willingness of your government to adjust the case on such terms. In that event, you will be furnished with proper instructions to bring it to a close. . . . . .

"It is not expected that Spain will stop at the adjustment of the case of the Black Warrior. Our citizens have many other claims, originating from the conduct of her officials at Cuba, which, in justice and honor, she is also bound to adjust. These must be pressed upon the attention of her government, and they will also be prepared for presentation as soon as they can be, after it is known that Spain is willing to adjust them.

"If the cession of the island of Cuba has to be hopelessly abandoned for the present, another very important matter will come up for consideration. The United States have asked, and will most pertinaciously insist upon, some security against the future misconduct of the Spanish authorities at Cuba. Looking to the past, the reasonableness of this demand must be acknowledged by Spain. A compliance with it is but an act of justice to the United States, and of prudent precaution to herself.

"Giving Spain credit for the sincerity of her repeated and solemn assurances of an intention in all times past to respect the rights of this government and the interests of our citizens, the failure of all her efforts to effect this object must convince her that there is some inherent defect in her present system of governing Cuba, and that its continuance will unavoidably lead to new difficulties.

"If Spain persists in maintaining her despotic administration over this dependency, situated so far beyond her immediate supervision, by vesting in her Captain-General powers which have been so often abused, it is incumbent upon her to provide for a direct appeal, by the injured citizens of friendly powers, to him, for redress.

"There is no local public opinion to exercise a restraining influence over him, in cases where foreigners are concerned, and no freedom of the press to expose

and animadvert upon his misconduct. In regard to such foreigners, the present arrangement imposes no adequate responsibility upon this officer; and just causes of complaint will continually arise, as they have heretofore arisen, until some change is made in the present system. If the feelings of Spain towards this country are such as she professes, if she desires to perpetuate the relations of peace with the United States, she will yield to our just demands on this subject.

"Direct diplomatic intercourse, by an agent of the United States with the Captain-General of Cuba, for the mere purpose of presenting grievances, will not meet the exigency of the case. The Captain-General must be under an efficient responsibility to redress the wrongs to our citizens committed by his subordinates, when brought to his notice.

"I have indicated what ought to be accomplished by such arrangement. Should there be no hope of opening a negotiation for the acquisition of Cuba, you will then present to the government of Spain the importance of some arrangement for future security, in regard to our trade and intercourse with Cuba, and state to her the objects to be secured by it. If she professes a willingness to make such an arrangement, a plan in detail will be forwarded to you, for the purpose of being laid before her government.

"In resuming negotiations with Spain, you will, in a firm but respectful manner, impress upon her Ministry that it is the determination of the President to have all the matters in controversy between her and the United States speedily adjusted. He is desirous to have it done by negotiation, and would exceedingly regret that a failure to reach the end he has in view, in this peaceful way, should devolve upon him the duty of recommending a resort to coercive measures, to vindicate our national rights and redress the wrongs of our citizens." Cong. Doc. 33 Cong. 2d Sess. H. R. No. 93, p. 127–132, 134, 135, 138, 139.

Page 122, Note *a*, (Continued.)

[In Cuba a distinction is made, by the order of the King of Spain, of October 21, 1817, professedly issued for the purpose of increasing the white population of the island, between domiciliation and naturalization. In the case of the former, great privileges are accorded; but the domiciled foreigner is not considered as expatriated, unless he takes out letters of naturalization; and during the first five years he is at liberty to return to his own country, and to take away from the island all the moneys or property he took there, without paying export duties, but on the increase of his property he must pay the per centum. The third section of the ordinance is as follows: — "After the foreign settlers have been residing five years on the island, and after binding themselves to remain there perpetually, they shall be granted all the rights and privileges of naturalization, and the same to the children that they may have taken there with them, or that may be born on the island; that they be admitted to all public and military employments, according to the talent or capacity of each." Cong. Doc. H. R. 33 Cong. 1st Sess. No. 86, p. 117.]

Page 301 *a*.

[A question arose between the United States and France, as to the immunities

of a Minister passing through the territories of a third power, in the case of Mr. Soulé, Minister of the United States at Madrid, who was stopped at Calais, in October, 1854, on his return to his post, from which he had been temporarily absent. The views of the French government are given, in a note from the Minister of Foreign Affairs to the American Minister in Paris, with regard to the privilege of transit, which was not denied, as well as respecting the position, in relation to that country, which the Envoy to Spain held, he being a native-born subject of France, and a naturalized citizen of the United States. While Mr. Soulé's quality of foreigner, deduced from his expatriation, is recognized as to all other matters, and no exception is taken to his title to the Spanish mission, Mr. Drouyn de Lhuys refers to the rule of the law of nations, which, he assumes, would have required a special agreement to have enabled him to represent, in his native land, the country of his adoption.

"Vous voyez, Monsieur, que le gouvernement de l'Empereur n'a pas voulu, comme vous semblez le croire, empêcher un envoyé des États-Unis de traverser le territoire François pour se rendre à son poste et s'acquitter de la commission dont il était chargé par son gouvernement. Mais entre ce simple passage et le séjour d'un étranger dont les antécédents ont éveillé, je regrette de le dire, l'attention des autorités chargées d'assurer chez nous l'ordre public, il existe une différence que Monsieur, le Ministre de l'Intérieur, avait à apprécier. Si Mr. Soulé se dirigeait immédiatement vers Madrid, la route de la France lui était ouverte; s'il devoit venir à Paris pour y séjourner, cette faculté ne lui étoit point accordée. Il y avoit donc à le consulter sur ses intentions, et c'est lui qui n'en a pas donné le tems.

"Nos lois sont précises au sujet des étrangers. Le Ministre de l'Intérieur en fait exécuter les dispositions rigoureuses, lorsque la nécessité lui en est démontrée; et il use alors d'un pouvoir discrétionnaire que le gouvernement de l'Empereur n'a jamais laissé discuter. La qualité d'étranger de Mr. Soulé le plaçait sous le coup de la mesure dont il a été revêtu. Vous reconnoitrez, Monsieur, que c'est ce que nous avons fait, et que le gouvernement des États-Unis, avec lequel le gouvernement de S. M. Impériale a à cœur d'entretenir des rapports d'amitié et d'estime, n'a nullement été atteint dans la personne d'un de ses représentants. Le Ministre des États-Unis en Espagne est libre, je le répète, de traverser la France; Mr. Soulé, qui n'a auprès de l'Empereur aucune mission à remplir, et qui, conformément à une doctrine consacrée par le droit des gens, auroit besoin, à raison de son origine, d'un agrément spécial pour représenter dans le pays de sa naissance le pays de son adoption, Mr. Soulé, simple particulier, rentre dans la loi commune qui lui a été appliquée, et ne peut prétendre à un privilège. Mr. Drouyn de Lhuys to Mr. Mason, November 1, 1854. Cong. Doc. 33d Cong. 2 Sess. Senate, No. 1.]

TABLE OF CASES,

FROM THE ENGLISH AND AMERICAN REPORTS.

B.

C.

D.

E.

F.

INDEX.

The Editorial Notes, as well as the Appendix, are referred to by an *a*, put after the figures denoting the page.

A.

B.

C.

D.

E.

F.

G.

H.

I.

J.

K.

L.

M.

N.

S.

U.

V.

W.

Z.